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In The

Supreme Court of the United States

GLADYS CHEHARDY, DANIEL FONTANEZ, JACQUELYN FONTANEZ, LARRY FORSTER, GLENDY FORSTER, ET AL.,

Petitioners,

v.

ALLSTATE INDEMNITY COMPANY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit erred in making its own erroneous "*Erie* guess" and failing to certify numerous questions to the Louisiana Supreme Court, including whether, under Louisiana law, the undefined term "flood" in the water damage exclusions of Respondents' All-Risk homeowners' insurance policies is ambiguous and, thus, did not exclude coverage for Petitioners' losses resulting from the man-made event and consequences of failed levees in the Greater New Orleans area as part of and following Hurricane Katrina.

PARTIES TO THE PROCEEDING

Petitioners are Gladys Chehardy, Daniel and Jacquelyn Fontanez, Larry and Glendy Forster, Kenneth and Judy Maier, Randy and Lori Gervais, Andre and Marlin Mauberret, Debbie and Dave Strawn, Stephanie and Brad Boyd, New Orleans Flooring Supply, Inc., Patricia Brown, Marie Fatheree, Katrina Daniels, Lionel and Edna Jones, Karen Lewis, Shane Sylvester, Austra Zapata, Sabrina Perkins, Eldridge Pollard, Michael Peterson, Wendell Glation and Mack Barham (collectively "Petitioners"). Petitioners instituted a class action on behalf of themselves and a class of All-Risk Homeowners Insurance policyholders who, on August 29, 2005, were Louisiana residents who owned immovable property with improvements, principally houses or related residential structures, that was destroyed or damaged by Hurricane Katrina and whose homeowners insurance companies have failed to pay the full damages for Petitioners' losses. Petitioners are plaintiffs before the District Court and were Appellees/Cross-Appellants before the United States Court of Appeals for the Fifth Circuit.

Respondents Lexington Insurance Company, The Standard Fire Insurance Company, Liberty Mutual Fire Insurance Company, Auto Club Family Insurance Company, Aegis Security Insurance Company, The American Insurance Company, Lafayette Insurance Company, Encompass Insurance Company, Louisiana Citizens Property Insurance Corporation,

PARTIES TO THE PROCEEDING – Continued

The Hanover Insurance Company, Allstate Indemnity Company and Allstate Insurance Company, Great Northern Insurance Company, Hanover Insurance Company and State Farm Fire and Casualty Company (collectively "Respondents") are insurance companies that sold All-Risk homeowners insurance policies to Petitioners and which have failed to pay Petitioners for their losses. Respondents are named as defendants in the District Court and were Appellants/Cross-Appellees in the United States Court of Appeals for the Fifth Circuit.

TABLE OF CONTENTS

		Page
I.	OPINIONS BELOW	1
II.	JURISDICTION	1
III.	STATUTES INVOLVED	1
IV.	STATEMENT OF THE CASE	2
V.	REASONS FOR GRANTING THE WRIT	8
	A. THE FIFTH CIRCUIT SHOULD HAVE CERTIFIED QUESTIONS OF FIRST IMPRESSION REGARDING THE INTERPRETATION OF HOMEOWNERS' INSURANCE POLICIES UNDER LOUISIANA LAW TO THE LOUISIANA SUPREME COURT BASED ON PRINCIPLES OF FEDERALISM AS WELL AS THE NEED FOR AN AUTHORATATIVE DECISION ON ISSUES OF SIGNIFICANT AND BROAD-BASED IMPORTANCE	8
	1. The Issue Is Determinative Of The Cause And Of Compelling Importance	11
	2. There Is No Clear Controlling Precedent From The Louisiana Supreme Court	12

TABLE OF CONTENTS – Continued

Page

B. THE COURT SHOULD GRANT THE PETITION BECAUSE THE FIFTH CIRCUIT'S "*ERIE* GUESS" IS ERRONEOUS BASED UPON A RECENT DECISION OF THE LOUISIANA FOURTH CIRCUIT COURT OF APPEAL 15

VI. CONCLUSION 20

TABLE OF CONTENTS – Continued

Page

APPENDIX

1. United States Court of Appeals for the Fifth Circuit's August 2, 2007 Opinion 2
2. United States District Court for the Eastern District of Lousiana's November 27, 2006 Opinion 74
3. United States Court of Appeals for the Fifth Circuit's August 27, 2007 Denial of Rehearing *en banc* 200
4. Louisiana Fourth Circuit Court of Appeal's November 19, 2007 Opinion 202

TABLE OF AUTHORITIES

Page

CASES

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 11

Chauvin v. State Farm Fire & Casualty Co., 495 F.3d 232 (5th Cir. 2007) 19

Fiess v. State Farm Lloyds, 392 F.3d 802 (5th Cir. 2004) 14

Frey v. Amoco Prod. Co., 951 F.2d 67 (5th Cir. 1992) 10

Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993) 17

Jefferson v. Lead Industrial Association, Inc., 106 F.3d 1245 (5th Cir. 1997) 7

Jesco Const. Corp. v. NationsBank Corp., 278 F.3d 444 (5th Cir. 2001) 10

In re Katrina Canal Breaches Litigation, 466 F. Supp. 2d 729 (E.D. La. 2006) 3, 10

Landry v. Louisiana Citizens Property Insurance Co., 964 So. 2d 463 (La. App. 3 Cir., August 28, 2007) 19

One Beacon Insurance Company v. Don's Building Supply, Inc., 496 F.3d 361 (5th Cir., August 8, 2007) 14

Sher v. Lafayette Insurance Company, et al., No. 2007-CA-0757 (La. App. 4th Cir., Nov 19, 2007) 7, 16, 17, 21

TABLE OF AUTHORITIES – Continued

Page

St. Charles Ventures, L.L.C. v. Albertsons, Inc., 265 F. Supp. 2d 682 (E.D. La. 2003) 13

St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531 (1978) 9

Swearingen v. Owens-Corning Fiberglas Corp., 968 F.2d 559 (5th Cir. 1992) 7

Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) 11

STATUTES AND RULES

15 U.S.C. § 1011 9

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1292 ..... 1, 9

28 U.S.C. § 1332 1

LA. SUP. CT. R. XII 2, 5, 7, 9, 10

OPINIONS BELOW

The November 27, 2006, opinion of the United States District Court for the Eastern District of Louisiana is published at 466 F. Supp. 2d 729. App. 2. The August 2, 2007, opinion of the United States Court of Appeals for the Fifth Circuit is published at 495 F.3d 191. App. 1. The United States Court of Appeals for the Fifth Circuit's August 27, 2007 denial of rehearing *en banc* is attached as part of the Appendix. App. 4.

JURISDICTION

The Eastern District of Louisiana has jurisdiction over Petitioners' claims pursuant to 28 U.S.C. § 1332. The United States Court of Appeals for the Fifth Circuit had jurisdiction over the matter pursuant to 28 U.S.C. § 1292. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Rule XII of the Louisiana Supreme Court provides:

> When it appears to the Supreme Court of the United States, or to any circuit court of appeal of the United States, that there are involved in any proceedings before it questions of propositions of law of this state which are determinative of said cause independently of any other questions involved in said case and that there are not clear controlling precedents in

> the decision may certify such questions or propositions of law of this state to the Supreme Court of Louisiana for rendition of a judgment or opinion concerning such questions or propositions of Louisiana law. This court may, in its discretion, decline to answer the questions certified to it.

LA. SUP. CT. R. XII.

STATEMENT OF THE CASE

On August 29, 2005, Southeast Louisiana and the City of New Orleans were struck by Hurricane Katrina. The Greater New Orleans Metropolitan Area incurred billions of dollars in losses and remained shut down and uninhabited for months. The catastrophic losses were the result, in significant part, of the failure of the man-made levee system in New Orleans, which resulted in millions of gallons of water inundating the City. As a result of this unprecedented catastrophic event up to 160,000 homes are estimated to be unusable.

Each of the Petitioners had purchased an All-Risk Homeowners Policy from one of the Respondents which was in effect at the time Hurricane Katrina hit Southeast Louisiana. Petitioners purchased their respective policies with the reasonable expectation that they would be able to recover for any and all losses to their residence and personal property caused by hurricanes, including any and all damage proximately and

efficiently caused by hurricane wind, as well as losses resulting from water released from the negligently designed and/or maintained New Orleans Area Levee System.

Upon proper and repeated demands by Petitioners, the Respondents have refused to meet their obligations under the All-Risk Policies and refused to pay the full damages for Petitioners' homes being destroyed or damaged by the efficient proximate cause of windstorms, storm surge and/or negligence. Following the Insurance Companies' refusal to pay for their losses, Petitioners instituted the class action ("the *Chehardy* Class Action"), seeking declaratory and monetary relief on behalf of themselves and the class that their losses were covered under the All-Risk Homeowners Policies they purchased.

Petitioners originally filed their claim in Louisiana state court, however, Respondents removed the case to the United States District Court for the Middle District of Louisiana. The case was subsequently transferred to the United States District Court for the Eastern District of Louisiana and consolidated as part of the *In re: Katrina Canal Breaches Consolidated Litigation*, 466 F. Supp. 2d 729 (E.D. La. 2006) ("the Consolidated Litigation"). Respondents filed Motions to Dismiss, arguing that their policies excluded the losses claimed by the Petitioners and relying primarily upon the so-called "Water Damage Exclusions."

On August 25, 2006 and October 27, 2006, the Honorable Stanwood R. Duval, Jr. of the United States

District Court for the Eastern District of Louisiana held hearings on the Respondents' Rule 12 Motions filed in the *Chehardy* Class Action. The principal issue before the Court was whether the Respondents' All-Risk Homeowners Policies provided coverage for losses alleged in the Chehardy Amended and Restated Complaint. On November 27, 2006, the District Court entered an Order denying the Motions of all Respondents in the *Chehardy* matter, except for the Motion to Dismiss of State Farm, which the Court granted as to the issue of coverage for Petitioners' losses.

In denying all of the Motions except that of State Farm, Judge Duval held that the undefined term "flood" in the Respondents' All-Risk Homeowners Policies was ambiguous and, therefore, was limited to naturally-occurring events causing water damage (*e.g.* the overflowing of the Mississippi River due to torrential rains). Consequently, those ambiguous exclusions did not preclude coverage for the Petitioners' losses that were caused by the negligent design, construction and maintenance of the New Orleans Levees which failed in the wake of Hurricane Katrina. With regard to Respondent State Farm, Judge Duval erroneously held that State Farm's "lead-in" language, or anti-concurrent causation clause, effectively excluded Petitioners' losses regardless of whether the inundation of water was caused naturally or by third-party negligence.

Respondents filed an appeal as to that portion of the District Court's Order that denied their Rule 12 Motions, and Petitioners filed a cross-appeal as to the portion of the District Court's Order granting State

Farm's Rule 12 Motion. As part of their appeal, Petitioners moved to have the following questions certified to the Louisiana Supreme Court pursuant to Rule XII of the Louisiana Supreme Court Rules:

> Question One: Is the undefined term "flood" as contained in the "water damage" exclusion section in the all risk policies at issue ambiguous and, thus, limited to exclude only damages caused by natural occurrences and not man-made occurrences?
>
> Question Two: Is the "lead in" provision, also known as the anti-concurrent causation clause, in the State Farm policies at issue ambiguous and, thus, limited to exclude only damages caused by natural occurrences and not man-made occurrences?
>
> Question Three: Is the "lead in" provision, also known as the anti-concurrent causation clause, in the State Farm policies at issue an unambiguous abrogation of Louisiana's efficient proximate cause doctrine?
>
> Question Four: If the answer to Question Three is yes, is the abrogation of Louisiana's efficient proximate cause doctrine and/or the language of the anti-concurrent causation clause against public policy and thus unenforceable?[1]

---

[1] Because the Court of Appeals ultimately determined that none of Respondents' water damage exclusions were ambiguous, the Court of Appeals never addressed the issues raised in Petitioners'

(Continued on following page)

The Court of Appeals held oral argument on Respondents' appeal and Petitioners' cross-appeal on June 6, 2007. On August 2, 2007, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's dismissal of Petitioners' claims against State Farm and vacated the District Court's Order insofar as it denied the Rule 12 motions filed by the remaining Respondents, holding that the water damage exclusions were unambiguous and that the undefined policy term "flood" was not limited to naturally-occurring events but expansively read to include man-made disasters. In doing so, the United States Court of Appeals for the Fifth Circuit denied Petitioners' Motion to Certify the above-listed questions to the Louisiana Supreme Court, instead making an "*Erie* guess" in the absence of a Louisiana Supreme Court ruling on the interpretation of water damage exclusions in the unique context of the failure of the Greater New Orleans Levee System. The Court of Appeals' entire analysis of the certification question was contained in a single footnote, in which the court stated:

> The motions of Xavier and the *Chehardy* plaintiffs to certify the questions raised in this appeal to the Louisiana Supreme Court

---

Questions Two through Four, as it had no reason to apply or interpret the anti-concurrent causation clause of State Farm or any of the Respondents. These questions remain unsettled under Louisiana law and, therefore, should be certified to the Louisiana Supreme Court for the same reasons the question of the ambiguity of the water damage exclusions should be similarly certified.

> pursuant to Rule XII of the Louisiana Supreme Court Rules are denied. Although we acknowledge that the Louisiana Supreme Court has not issued a definitive ruling on the interpretation of a flood exclusion in the context of the facts before us, this is not alone sufficient to warrant certification. *See Jefferson v. Lead Indus. Ass'n, Inc.*, 106 F.3d 1245, 1247 (5th Cir.1997) (per curiam) ("Alone, the absence of a definitive answer from the state supreme court on a particular question is not sufficient to warrant certification."). Because the rules of contract interpretation set forth in the Louisiana Civil Code provide us with an adequate basis to decide this appeal, we decline the certification requests. *Cf. Swearingen v. Owens-Corning Fiberglas Corp.*, 968 F.2d 559, 564 (5th Cir.1992) (refusing to certify question where "decisional analysis is relatively straightforward").

495 F.3d at 208 n.11. Petitioners now seek this Court's review of the Court of Appeals' denial of Petitioners' Motion to Certify. Moreover, the November 19, 2007 decision of the Louisiana Fourth Circuit Court of Appeal in *Sher v. Lafayette Insurance Company, et al.*, No. 2007-CA-0757 demonstrates that the Court of Appeals' "*Erie* guess" was incorrect, thus warranting an order vacating the August 2, 2007 Order.

REASONS FOR GRANTING THE WRIT

A. THE FIFTH CIRCUIT SHOULD HAVE CERTIFIED QUESTIONS OF FIRST IMPRESSION REGARDING THE INTERPRETATION OF HOMEOWNERS' INSURANCE POLICIES UNDER LOUISIANA LAW TO THE LOUISIANA SUPREME COURT BASED ON PRINCIPLES OF FEDERALISM AS WELL AS THE NEED FOR AN AUTHORITATIVE DECISION ON ISSUES OF SIGNIFICANT AND BROAD-BASED IMPORTANCE.

The Petition should be granted because the Court of Appeals erred in failing to certify open questions of insurance policy interpretation under Louisiana law to the Louisiana Supreme Court. Despite acknowledging that there was no controlling precedent by the Louisiana Supreme Court on the interpretation of the undefined term "flood" as contained in Respondents' water damage exclusions, the United States Court of Appeals for the Fifth Circuit ignored principles of federalism and rejected the opportunity for Louisiana's highest court to provide an authoritative response to issues facing hundreds of thousands of Greater New Orleans Metropolitan Area homeowners as they seek to have their homeowners' insurance claims paid. In fact, the Court of Appeals failed to conduct any analysis of the federalism principles central to the certification question, instead choosing to make an "*Erie* guess" on the questions pending.

Historically, insurance has been an area over which "the States [have] enjoyed a virtually exclusive

domain." *See St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978); 15 U.S.C. § 1011 (stating that "the continued regulation and taxation by the several States of the business of insurance is in the public interest"). Thus, the Court of Appeals should have allowed the Louisiana Supreme Court to provide a controlling interpretation on questions of Louisiana homeowner's policy interpretation that will impact hundreds of thousands of Louisiana residents as well as various state and local governments and the entire economic and societal makeup of Greater New Orleans. In fact, the United States District Court in the case at bar specifically opined that this case was of such importance as a matter of Louisiana law that it should be immediately certified to the Louisiana Supreme Court:

> Pursuant to 28 U.S.C. §1292(b) all orders entered herein involve a controlling question of law as to which there is a substantial ground for a difference of opinion and an immediate appeal from these orders may materially advance the ultimate termination of the litigation. In accordance with 28 U.S.C. §1292(b), an application for appeal must be made to the Court of Appeals within ten days after the entry of this order.
>
> The Court notes that if it had the power under Rule XII of the Rules of the Louisiana Supreme Court to certify the issues decided herein to that court, it would have done so, since there are no clear controlling precedents of the Louisiana Supreme Court on

> same and the issues presented and decided herein are significant and require an application of Louisiana law.

In re Katrina Canal Breaches Litig., 466 F. Supp. 2d 729, 780-781.

Under Louisiana law, this Court or any circuit court of appeals of the United States may to certify a question of law to the Louisiana Supreme Court if: (1) the issue is determinative of the cause and (2) there is no clear controlling precedent in the decisions of the State Supreme Court. LA. SUP. CT. R. XII; *Jesco Const. Corp. v. NationsBank Corp.*, 278 F.3d 444, 448 (5th Cir. 2001). In fact, the United States Court of Appeals for the Fifth Circuit has utilized the certification process when it has determined that an issue carried "tremendous consequences" for a particular state. *Jesco*, 278 F.3d at 448; *Frey v. Amoco Prod. Co.*, 951 F.2d 67, 67 (5th Cir. 1992). Indeed, when faced with such an important question, the United States Court of Appeals for the Fifth Circuit has avoided making an "*Erie* guess" as to how the Louisiana Supreme Court might rule and instead has requested binding advice through certification. *Jesco*, 278 F.3d at 448. Despite precedent in which it certified issues of "tremendous consequence" to a state's highest court, the United States Court of Appeals for the Fifth Circuit erroneously refused to do so in this matter.

This Court has viewed certification favorably, albeit in limited circumstances, stating that certification "allows a federal court faced with a novel state-law

question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997). Moreover, this Court has recognized that certification on questions of first impression or which are unsettled under state law effectively "save[s] time, energy, and resources and helps build a cooperative judicial federalism." *Id.* Moreover, as Justice Stevens has stated, "principles of federalism and comity favor giving a State's high court the opportunity to answer important questions of state law, particularly when those questions implicate uniquely local matters." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 777 (2005) (Steven, J., dissenting). The United States Court of Appeals for the Fifth Circuit ignored these principles in refusing to certify the questions before it to the Louisiana Supreme Court.

1. The Issue Is Determinative Of The Cause And Of Compelling Importance.

The issues before the United States Court of Appeals for the Fifth Circuit in this matter have widespread and "tremendous consequences" upon Louisiana residents who suffered catastrophic losses to their homes as a result of Hurricane Katrina. Given the staggering number of homeowners who suffered losses as a result of Hurricane Katrina, it is difficult to imagine a case that could have greater consequences to the residents of a state than the

instant matter. Consequently, the questions of insurance policy interpretation in this matter "implicate uniquely local matters." Further, there are several thousand cases pending in Louisiana state courts involving coverage for homeowners' losses resulting from Hurricane Katrina and the issues before the United States Court of Appeals for the Fifth Circuit are directly relevant to the coverage issues in those cases. The homeowners' insurance policy issues that the United States Court of Appeals for the Fifth Circuit addressed will impact and, in some instances, dispose of many of those cases. Accordingly, just as it is difficult to imagine a case with more significant consequences, it is equally incomprehensible that a more compelling case could be made for the need for an authoritative response by the highest court of a state.

2. There Is No Clear Controlling Precedent From The Louisiana Supreme Court.

Despite these plainly compelling circumstances favoring deference to the Louisiana Supreme Court, the Fifth Circuit nevertheless denied certification, failing to even address the very federalism and comity considerations this Court has deemed central to the certification query. The United States Court of Appeals for the Fifth Circuit acknowledged that the issues of homeowners' insurance policy interpretation in the instant matter have not been ruled upon by the Louisiana Supreme Court and stated that the lack of a ruling "is not alone sufficient to warrant certification." App. 1

at 208 n.11. The Court of Appeals conducted no further analysis as to whether the issues before it were of the type which involved "uniquely local issues," whether they were of "tremendous consequence" to the residents of Louisiana, or whether certification would reduce delay, cut costs, or "increase the assurance of gaining an authoritative response." Instead, the United States Court of Appeals for the Fifth Circuit simply made a speculative "*Erie* guess" as to how the Panel believed the Louisiana Supreme Court would interpret the water damage exclusions found in Respondents' All-Risk homeowners' policies.

The Court of Appeals ignored the opportunity to certify the questions of insurance policy interpretation to the Louisiana Supreme Court, supplanting the expertise of the Louisiana high court in applying and interpreting Louisiana's Civil Code with its own "*Erie* guess." Louisiana law is particularly unique because of its Civil Law tradition. Consequently, Louisiana state courts are best equipped to determine issues of Louisiana law, a point the District Court recognized in its opinion in stating that it would have certified the questions to the Louisiana Supreme Court if it was empowered to do so. *See St. Charles Ventures, L.L.C. v. Albertsons, Inc.*, 265 F. Supp. 2d 682 (E.D. La. 2003). Yet, the very same United States Court of Appeals for the Fifth Circuit panel that refused to certify the questions in this case certified a question of insurance policy interpretation to the Supreme Court of Texas a mere six days after refusing to do so

in this matter. In *One Beacon Insurance Company v. Don's Building Supply, Inc.*, 496 F.3d 361 (5th Cir., August 8, 2007), the Fifth Circuit certified the question of when property damage occurs for purposes of an occurrence-based commercial general liability policy to the Supreme Court of Texas after determining that the Texas high court had not yet definitively ruled on the question. 496 F.3d at 364. Thus, in *One Beacon*, the Court of Appeals gave the Supreme Court of Texas the very deference and opportunity to provide an authoritative answer that is has denied the Louisiana Supreme Court here.

Similarly, the same result was reached by the Court of Appeals in another insurance case, *Fiess v. State Farm Lloyds*, 392 F.3d 802 (5th Cir. 2004), when the Court of Appeals certified to the Supreme Court of Texas the question of whether coverage was excluded by way of an "ensuing loss" provision contained in a homeowners' policy. 392 F.3d at 811-12. In doing so, the Court of Appeals noted that it "could make an *Erie*-guess" as to how the Texas Supreme Court would rule but that "the better approach, given the significance of the issue, is to certify the question to the only court that can settle this uncertainty with finality." *Id.* at 811. Despite recognizing in *Fiess* that the "better approach" is to certify unsettled state-law questions to the highest court of the state, it failed to do so in the instant matter.

The *One Beacon* and *Fiess* cases are far less compelling ones for certification as they involved the interpretation of a single policy purchased by one

commercial policyholder and, therefore, the result of any "*Erie* guess" by the United States Court of Appeals for the Fifth Circuit would not automatically impact the right to recovery of thousands of litigants and an entire class of plaintiffs as in the instant case. Despite the absence of those characteristics, the Court of Appeals nevertheless provided the Supreme Court of Texas the opportunity to rule on a uniquely state-law controlled issue. In the instant case, the Court of Appeals not only denied the Louisiana Supreme Court the deferential opportunity, but in doing so, it failed to consider the comity and federalism factors this Court has deemed critical to the certification question. Consequently, this Court should grant the Petition, vacate the Court of Appeals' August 2, 2007 Opinion and either certify the questions in Petitioners' Motion to Certify directly to the Louisiana Supreme Court, or direct the Court of Appeals to do so.

B. THE COURT SHOULD GRANT THE PETITION BECAUSE THE FIFTH CIRCUIT'S "*ERIE* GUESS" IS ERRONEOUS BASED UPON A RECENT DECISION OF THE LOUISIANA FOURTH CIRCUIT COURT OF APPEAL.

The Petition should be granted in this case so that certification may occur because intervening events have demonstrated that the Court of Appeals' "*Erie* guess" is incorrect. The Fifth Circuit determined that the undefined term "flood" in Respondents

water damage exclusions was not ambiguous and included man-made inundations, thus excluding from coverage losses arising out of the failed levees in and around New Orleans. However, on November 19, 2007, the first Louisiana appellate court to ever speak on the issue, the Louisiana Fourth Circuit Court of Appeal held in *Sher v. Lafayette Insurance Co.*, No. 2007-CA-0757, that a water damage exclusion is ambiguous if it fails to define the term "flood" as encompassing man-made or naturally occurring. App. 3. A majority of the panel in *Sher* determined, *inter alia*, that Lafayette Insurance Company's water damage exclusion is ambiguous and unenforceable as it fails to define the term "flood" and is "unclear as to what types of flood are excluded." App. 3 at 9. The water damage exclusion in *Sher* provided, in relevant part:

> **1. EXCLUSIONS**
>
> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> . . . .
>
> **G. Water**
>
> (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not.

App. 3 at 7. The All-Risk homeowners policies sold by Lafayette Insurance Company and at issue in *Sher* uses form language drafted by the world's largest insurance policy drafting organization, Insurance Services Office, Inc. ("ISO"). *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 772 (1993). Several of the other Respondents in this matter use the same ISO water damage exclusion as Lafayette, including Lexington Insurance Company, The Standard Fire Company, Liberty Mutual Fire Insurance Company, Auto Club Family Insurance Company, Aegis Security Insurance Company, The American Insurance Company, Louisiana Citizens Property Insurance Company and The Hanover Insurance Company (collectively "the ISO Respondents"). Moreover, the remaining Respondents, while not using the ISO form Language, have virtually identical water damage exclusions and similarly fail to define the term "flood."

The court in *Sher* looked to the language of the policies sold, as well as Louisiana statutes, and ultimately held the water damage exclusion ambiguous, stating:

> The common intent of the parties in an insurance contract is to provide insurance coverage. The meaning of "flood" is not defined within the Policy. Therefore, it must be given its generally prevailing meaning. However, because "flood" is susceptible to different meanings due to various causes of floods, we must find a meaning that conforms to the object of the contract, which also renders the contract effective.

A review of the Policy reveals that the parties intended to cover and include all risks that were specifically not excluded or limited. Lafayette failed to specifically exclude all floods because of the ambiguity contained within the water exclusion. While the Policy states that it does not cover damage caused by a "flood," it also states that it does not cover "waves, tides, tidal waves," and the "overflow of any body of water . . . whether driven by the wind or not." This exclusion includes "flood," but then continues to list specific natural disasters that cause inundations of water, commonly labeled as "floods." For example, a varying cause of a flood can be man-made or natural, as documented in La. R.S. 29:762, which states that a flood is a natural disaster.

A contract must be interpreted to achieve its purpose. La. C.C. art. 2054. The purpose of the Policy was to provide insurance coverage for all risks not specifically excluded or limited. Therefore, in case of any doubt, when interpreting a contract of a standard form, the contract must be interpreted against Lafayette as the issuer of the Policy.

As such, after a *de novo* review, we make the legal determination that the Policy with Lafayette is ambiguous as it relates to the water exclusion because it is unclear what types of floods are excluded. Therefore, strictly construed against Lafayette, Mr.

> Sher is covered for the damage to the basement level of the building.

App. 3 at 8-9 (footnotes omitted). Accordingly, just as the District Court held in this matter, the *Sher* Court – a Louisiana Court of Appeal – held that the undefined term "flood" as contained in a water damage exclusion in an All-Risk policy is ambiguous as a matter of Louisiana law. As such, as controlling authority in the State of Louisiana, the *Sher* decision makes clear that the water damage exclusions of the Respondents in this case are ambiguous and unenforceable insofar as those water damage exclusions similarly fail to define the term flood. Thus, the District Court's November 27, 2006 Order was correct, and the Court of Appeals' reversal of that decision was erroneous. App. 2.[2]

Because the Fifth Circuit's "*Erie* guess" was incorrect and could have been avoided through a proper exercise of discretion by certifying the issue to

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[2] The *Sher* decision is not the first Hurricane Katrina-related litigation in which the "Erie guess" of the United States Court of Appeals of the Fifth Circuit has been incorrect. In a related Hurricane Katrina decision interpreting Louisiana's Valued Policy Law, the Louisiana Third Circuit in *Landry v. Louisiana Citizens Property Insurance Co.*, 964 So.2d 463, 479, 2007-247 (La. App. 3 Cir., August 28, 2007), upheld Louisiana's efficient proximate cause doctrine contrary to the holding of the United States Fifth Circuit Court Of Appeals decision in *Chauvin v. State Farm Fire & Cas. Co.*, 495 F.3d 232 (5th Cir. 2007). The Landry decision is further evidence of why this Honorable Court, on the grounds of federalism, comity, judicial efficiency and justice should grant the Petition.

the Louisiana Supreme Court, the Court should grant the Petition and vacate the judgment of the United States Court of Appeals for the Fifth Circuit, directing the Fifth Circuit to certify the issues presented in this action to the Louisiana Supreme Court.

CONCLUSION

For the foregoing reasons, Petitioners request that this Court grant Certiorari, vacate the judgment below and remand this case with direction to the Court of Appeals to certify the following questions to the Louisiana Supreme Court:

> Question One: Is the undefined term "flood" as contained in the "water damage" exclusion section in the all risk policies at issue ambiguous and, thus, limited to exclude only damages caused by natural occurrences and not man-made occurrences?
>
> Question Two: Is the "lead in" provision, also known as the anti-concurrent causation clause, in the State Farm policies at issue ambiguous and, thus, limited to exclude only damages caused by natural occurrences and not man-made occurrences?
>
> Question Three: Is the "lead in" provision, also known as the anti-concurrent causation clause, in the State Farm policies at issue an unambiguous abrogation of Louisiana's efficient proximate cause doctrine?

> Question Four: If the answer to Question Three is yes, is the abrogation of Louisiana's efficient proximate cause doctrine and/or the language of the anti-concurrent causation clause against public policy and thus unenforceable?

Alternatively, Petitioners request that the Court grant this Petition, vacate the judgment below and direct the United States Court of Appeals for the Fifth Circuit to stay the mandate in this case in light of the anticipated appeals to the Louisiana Supreme Court in the *Sher* matter.

Dated: November 26, 2007

Respectfully submitted,

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Counsel for Petitioners

495 F.3d 191

United States Court of Appeals,Fifth Circuit.

In re: KATRINA CANAL BREACHES LITIGATION.

Richard Vanderbrook; Mary Jane Silva; James Capella; Madeline Grenier, misidentified as Sophia Granier; Jack Capella, as the Executor of the Succession of Lilian Capella; Gregory Jackson; Peter Ascani, III; Robert G. Harvey, Sr.,
Plaintiffs-Appellees-Cross-Appellants,

v.

Unitrin Preferred Insurance Company; Hanover Insurance Company; Standard Fire Insurance Company,
Defendants-Appellants,
State Farm Fire and Casualty Company
Defendant-Cross-Appellee.

Kelly A. Humphreys,
Plaintiff-Appellee-Cross-Appellant,

v.

Encompass Indemnity Company,
Defendant-Appellant-Cross-Appellee.

Xavier University of Louisiana,
Plaintiff-Appellee,

v.

Travelers Property Casualty Company of America,
Defendant-Appellant.

Gladys Chehardy; Daniel Fontanez; Jacquelyn Fontanez; Larry Forster; Glendy Forster; et al.
Plaintiffs-Appellees-Cross-Appellants,

v.

Allstate Indemnity Company; Allstate Insurance Company; American Insurance Company; Aegis Security Insurance Company; Lafayette Insurance Company; Liberty Mutual Fire Insurance

Company; AAA Homeowners Auto Club Family Insurance Company; Louisiana Citizens Property Insurance Corporation; Lexington Insurance Company; Encompass Insurance Company of America; Great Northern Insurance Company; Hanover Insurance Company; Standard Fire Insurance Company,
Defendants-Appellants,
State Farm Fire and Casualty Company,
Defendant-Cross-Appellee.
No. 07-30119.

Aug. 2, 2007.

Joseph M. Bruno, David S. Scalia, Bruno & Bruno, New Orleans, LA, James Parkerson Roy, Domengeaux, Wright, Roy & Edwards, Lafayette, LA, Joseph J. McKernan, McKernan Law Firm, Larry Dewayne Dyess, Baton Rouge, LA, Drew A. Ranier, Norval F. Elliot, III, Ranier, Gayle & Elliot, Lake Charles, LA, David Blayne Honeycutt, Wanda Jean Edwards, Fayard & Honeycutt, Calvin Clifford Fayard, Jr., Denham Springs, LA, Matthew D. Schultz, Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, Pensacola, FL, John N. Ellison (argued), Anderspon, Kill & Olick, Philadelphia, PA, for Plaintiffs-Appellees-Cross-Appellants.

Christopher Todd Handman, Hogan & Hartson, Washington, DC, Steven W. Usdin, Barrasso, Usdin, Kupperman, Freeman & Sarver, New Orleans, LA, for Great Northern Ins. Co.

James M. Garner, Sher Garner Cahill Richter Klein & Hilbert, New Orleans, LA, for Xavier University of Louisiana.

Laura Anne Foggan, Wiley Rein LLP, Washington, DC, for Am. Ins. Ass'n., Nat. Ass'n of Mut. Ins. Co., Property Cas. Insurers Ass'n of America and Reinsurance Ass'n of America, Amici Curiae.

Levon G. Hovnatanian, Christopher Weldon Martin, Martin R. Sadler, Martin, Disiere, Jefferson & Wisdom, Houston, TX, for United Services Auto. Ass'n, Amicus Curiae.

Alan S. Gilbert, Anne W. Mitchell, Sonnenschein, Nath & Rosenthal, Chicago, IL, for Horace Mann Ins. Co., Amicus Curiae.

Dominic J. Ovella, Sean Patrick Mount, Daniel Michael Redmann, Hailey, McNamara, Hall, Larmann & Papale, Metairie, LA, for Fidelity & Deposit Co. of Maryland, Empire Fire & Marine Ins. Co., Empire Indem Ins. Co. and Centre Ins. Co., Amici Curiae.

Marshall M. Redmon, Phelps Dunbar, Baton Rouge, LA, for Farmers Ins. Exchange, Amica Mut. Ins. Co. and Republic Fire & Cas., Amici Curiae.

Amy R. Sabrin, Skadden, Arps, Slate, Meagher & Flom, Washington, DC, for Farmers Ins. Exchange, Amicus Curiae.

John Powers Wolff, III, Steven C. Judice, Nancy B. Gilbert, Christopher Keith Jones, Tiffany N.

Thornton, Keogh, Cox & Wilson, Ltd., Baton Rouge, LA, for Amica Mut. Ins. Co., Amicus Curiae.

Christopher Raymond Pennison, Jay M. Lonero, Larzelere, Picou, Wells, Simpson & Lonero, Metairie, LA, for Republic Fire & Cas. Ins. Co., Amicus Curiae.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before KING, DeMOSS and OWEN, Circuit Judges.

KING, Circuit Judge:

On the morning of August 29, 2005, Hurricane Katrina struck along the coast of the Gulf of Mexico, devastating portions of Louisiana and Mississippi. In the City of New Orleans, some of the most significant damage occurred when levees along three major canals – the 17th Street Canal, the Industrial Canal, and the London Avenue Canal – ruptured, permitting water from the flooded canals to inundate the city. At one point in Katrina's aftermath, approximately eighty percent of the city was submerged in water.

Each plaintiff in this case is a policyholder with homeowners, renters, or commercial-property insurance whose property was damaged during the New Orleans flooding. Despite exclusions in their policies providing that damage caused by "flood" is not covered, the plaintiffs seek recovery of their losses from their insurers. Their primary contention is that the massive inundation of water into the city was the result of the negligent design, construction, and

maintenance of the levees and that the policies' flood exclusions in this context are ambiguous because they do not clearly exclude coverage for an inundation of water induced by negligence. The plaintiffs maintain that because their policies are ambiguous, we must construe them in their favor to effect coverage for their losses.

We conclude, however, that even if the plaintiffs can prove that the levees were negligently designed, constructed, or maintained and that the breaches were due to this negligence, the flood exclusions in the plaintiffs' policies unambiguously preclude their recovery. Regardless of what caused the failure of the flood-control structures that were put in place to prevent such a catastrophe, their failure resulted in a widespread flood that damaged the plaintiffs' property. This event was excluded from coverage under the plaintiffs' insurance policies, and under Louisiana law, we are bound to enforce the unambiguous terms of their insurance contracts as written. Accordingly, we conclude that the plaintiffs are not entitled to recover under their policies.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The cases in this appeal are a handful of the more than forty currently pending cases related to Hurricane Katrina that have been consolidated for pretrial purposes in the Eastern District of Louisiana. In several of the consolidated cases, property owners

are suing their insurers to obtain recovery under homeowners, renters, and commercial-property policies for the damage their property sustained during the inundation of water into the city that accompanied the hurricane. This appeal involves four such cases: *Richard Vanderbrook et al. v. Unitrin Preferred Insurance Company et al.* ("the *Vanderbrook* action"), *Xavier University of Louisiana v. Travelers Property Casualty Company of America* ("the *Xavier* action"), *Gladys Chehardy et al. v. State Farm Fire & Casualty Company et al.* ("the *Chehardy* action"), and *Kelly A. Humphreys v. Encompass Indemnity Company* ("the *Humphreys* action").[1] The detailed factual and procedural background of each of these cases follows.

A. The Vanderbrook Action

In the *Vanderbrook* action, eight individuals ("the *Vanderbrook* plaintiffs") filed a petition for damages in Louisiana state court against their insurers.[2] The *Vanderbrook* plaintiffs allege that "[s]ometime between 10:00 and 11:00 a.m. on August 29, 2005, before the full force of [Hurricane Katrina] reached

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[1] The *Humphreys* action was initially consolidated with the remaining cases, but on Encompass Indemnity Company's motion, the district court severed it from the consolidated case.

[2] The *Vanderbrook* plaintiffs also sued the Board of Commissioners for the Orleans Levee District for the Parish of Orleans, but the claim against that defendant is not at issue in this appeal.

the City of New Orleans, a small section of the concrete outfall canal wall known as the 17th Street Canal, suddenly broke, causing water to enter the streets of the [c]ity," resulting in damage to their insured property. They assert that the water damage "was not the result of flood, surface water, waves, [tidal] water, tsunami, seiche, overflow of a body of water, seepage under or over the outfall canal wall or spray from any of the above but was water intrusion, caused simply from a broken levee wall."

The *Vanderbrook* plaintiffs allege that their insurers have refused to adjust or pay for their losses, despite "a sudden break in the concrete wall of the levee outfall canal" not being described in any of their policies as an excluded loss. They assert that their insurance policies are contracts of adhesion and are "unduly and unreasonably complex," resulting in their lack of understanding of the policies' provisions. And they allege that the policies' exclusions are so "oppressive" to them and "unreasonably favorable" to the insurers that the exclusions are unconscionable and void. The *Vanderbrook* plaintiffs seek compensatory damages, additional damages for the insurers' arbitrary and capricious conduct, interest, expert fees, and attorney's fees.

Plaintiffs-appellees James Capella and Madeline Grenier were insured through defendant-appellant Hanover Insurance Company ("Hanover"), plaintiffs-appellees Peter Ascani III and Gregory Jackson were insured through defendant-appellant Standard Fire

Insurance Company ("Standard Fire"), and plaintiff-appellee Richard Vanderbrook was insured through defendant-appellant Unitrin Preferred Insurance Company ("Unitrin"). The Hanover,[3] Standard Fire, and Unitrin policies provide coverage for risk of direct physical loss to structures on the property as well as for certain risks of loss to personal property, as long as the loss is not an excluded peril. The policies contain the following flood exclusion:

> We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.
>
> . . . .
>
> . . . Water Damage, meaning:
>
> . . . Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind. . . .

Plaintiffs-cross-appellants Mary Jane Silva and Robert G. Harvey Sr. were insured through defendant-cross-appellee State Farm Fire and Casualty Company

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[3] At oral argument before the district court, a copy of Madeline Grenier's policy with Hanover that contains only the odd-numbered pages was inserted into the record. Because the copy of the policy in the record is incomplete, we cannot adequately review it. Consequently, we leave it to the district court on remand to obtain a copy of the entire policy and to interpret it consistently with this opinion.

("State Farm"). The State Farm policies insured against loss to the dwelling and for certain losses to personal property except as excluded by the policy. The policies contained the following flood exclusion:

> We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:
>
> . . . .
>
> . . . Water Damage, meaning:
>
> > (1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, all whether driven by wind or not. . . .

The *Vanderbrook* action was removed to federal court on the basis of diversity jurisdiction. Hanover, Standard Fire, Unitrin, and State Farm filed Rule 12(c) motions for judgment on the pleadings, contending that the *Vanderbrook* plaintiffs' losses were excluded under their respective policies. In a single eighty-five-page order issued on November 27, 2006, the district court addressed the availability of coverage under the

policies at issue in all four cases in this appeal, first addressing the *Vanderbrook* action. With respect to Hanover, Standard Fire, and Unitrin, the district court denied their motions and ruled that the plaintiffs' policies insured them against loss from water damage resulting from levee breaches where the breaches were induced by negligence. The court determined that the policies' flood exclusions were ambiguous because the term "flood" was susceptible to two reasonable definitions: one that relates to floods resulting from natural causes only and one that relates to floods resulting from both natural causes and negligent or intentional acts.

The district court reached this conclusion based on several sources. First, the court discussed dictionary definitions of the term "flood" and opined that the definitions contemplated a natural event caused by rain or tide. Second, the court looked to cases interpreting "water damage" exclusions in the context of ruptured water mains, as well as "earth movement" exclusions, wherein courts have applied a distinction between naturally and non-naturally occurring events. Finally, the court considered but rejected cases that interpreted flood exclusions as extending to inundations of water caused by the rupture of a dam or dike.

Having concluded that the term "flood" as used in the exclusions was ambiguous, the district court construed the Hanover, Standard Fire, and Unitrin policies in the insureds' favor and concluded that the policies covered water damage caused by a ruptured

levee where the rupture was due to the levee's inadequate design, construction, or maintenance. Because the plaintiffs alleged that the post-Katrina inundation of water into the City of New Orleans was caused by negligent design, construction, and maintenance of the levees alongside the city's canals, the court decided that if the plaintiffs could prove their allegations, they could prevail. Accordingly, the district court denied Hanover's, Standard Fire's, and Unitrin's motions.

With respect to State Farm's policies, however, the district court concluded that the flood exclusion's "lead-in" clause removed any ambiguity and clearly excluded coverage for all floods, whether natural or not. The "lead-in" language on which the district court relied provides in part: "We do not insure for such loss [i.e., loss resulting from flood] regardless of . . . the cause of the excluded event[] or . . . whether the event . . . arises from natural or external forces." The court granted State Farm's motions and dismissed the actions against it.

B. The Xavier Action

Plaintiff-appellee Xavier University of Louisiana ("Xavier") filed suit against its insurer, defendant-appellant Travelers Property Casualty Company of America ("Travelers"), in federal court on the basis of diversity jurisdiction. In its complaint, Xavier alleged that Hurricane Katrina caused in excess of $30 million in damage to insured structures on its

campus. The complaint itself does not allege how the damage was caused – i.e., by water inundation from failed levees or otherwise. Xavier avers that it has filed a claim with Travelers and that despite lengthy communication, the insurer has failed to pay for the damage to Xavier's campus. Xavier brings claims for breach of contract and for violations of various provisions of Title 22 of the Louisiana Revised Statutes, seeking compensatory damages, attorney's fees, and statutory penalties.

Xavier's commercial policy with Travelers provided coverage for direct physical loss to buildings and personal property, subject to policy limitations and exclusions. The policy contained the following flood exclusion:

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> . . . .
>
> . . . Water
>
> . . . Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not. . . .

Xavier filed a motion for partial summary judgment, seeking a ruling that as a matter of law (1) the damage to Xavier's campus was "caused by ground water which came from the collapses of the 17th Street Canal and the London Avenue Canal levees as

a result of man-made causes" and (2) such damage was covered under Xavier's policy with Travelers. The district court granted the motion in part and denied it in part. For the same reasons that the court denied Hanover's, Unitrin's, and Standard Fire's motions in the *Vanderbrook* action, the court granted partial summary judgment in Xavier's favor on the second issue, determining that water damage resulting from a failed levee due to negligence would be covered under the insurance policy. But the court denied Xavier's partial-summary-judgment motion on the question whether the damage to the campus was in fact caused by the collapses of the levees, concluding that there were material questions of fact as to the cause of Xavier's water damage.

C. The Chehardy Action

In the *Chehardy* action, a group of thirty individuals and one corporation ("the *Chehardy* plaintiffs")[4] allege that their real and personal property was damaged or destroyed by the inundation of water

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[4] The *Chehardy* plaintiffs comprise plaintiffs-appellees-cross-appellants Gladys Chehardy; Daniel and Jacquelyn Fontanez; Larry and Glendy Forster; Kenneth and Judy Maier; Randy and Lori Gervais; Andre and Marlin Mauberret; Debbie and Dave Strawn; Stephanie and Brad Boyd; New Orleans Flooring Supply, Inc.; Shawn and Angelina Burst; Patricia Brown; Marie Fatheree; Katrina Daniels; Lionel and Edna Jones; Karen Lewis; Shane Sylvester; Austra Zapata; Sabrina Perkins; Eldridge Pollard; Michael Peterson; Wendell Glation; and Mack Barham.

into the City of New Orleans that followed Hurricane Katrina. They bring a putative class action[5] against their insurers, asserting that their losses were covered by their respective insurance policies.

The defendants in the *Chehardy* action are thirteen insurance companies. Among them is a group of insurers hereinafter called "the ISO Defendants," so named because these insurers used policy forms provided by Insurance Services Office, Inc. The ISO Defendants are defendants-appellants Lafayette Insurance Company ("Lafayette"), Liberty Mutual Fire Insurance Company ("Liberty Mutual"), American Insurance Company ("American"), Auto Club Family Insurance Company ("Auto Club"), Standard Fire, Lexington Insurance Company ("Lexington"), Aegis Security Insurance Company ("Aegis"), and Hanover. The remaining *Chehardy* defendants are defendants-appellants Allstate Indemnity Company and Allstate Insurance

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[5] The amended complaint defines the class of policyholders as

> all owners in the Parishes of Orleans, St. Bernard, and Jefferson, State of Louisiana, who own immovable property with improvements, principally houses or related residential structures, as well as personal property located there, which was destroyed or damaged by winds generated by Hurricane Katrina in excess of their respective policy deductibles and not reimbursed by their insurance companies, but excluding members of the judiciary, their administrative staff and any other personnel who may cause a member of the Louisiana bench to be unable to preside over this action.

Company (collectively, "Allstate"), Louisiana Citizens Property Insurance Corporation ("Louisiana Citizens"), Encompass Insurance Company of America ("Encompass Insurance"), and Great Northern Insurance Company ("Great Northern"), as well as defendant-cross-appellee State Farm.

In their amended complaint, the *Chehardy* plaintiffs allege that after Hurricane Katrina made landfall on August 29, 2005, the New Orleans-area levee system was breached in at least eight places, causing water to be released into the city and adjoining parishes. According to the amended complaint, by 9:00 a.m. on August 29, approximately three hours after the hurricane's landfall, there was six to eight feet of water in the Lower Ninth Ward area of New Orleans, and approximately eighty percent of Orleans Parish ultimately became submerged. The plaintiffs aver their properties sustained damage as a result of these events.

The *Chehardy* plaintiffs also allege that "any damages attributable to the levee failures are the result of improper and/or negligent design, construction, [or] maintenance of the levees by various third parties and or third party negligence." The complaint refers to engineering reports concluding that "the vast amounts of the water that entered the City of New Orleans and the surrounding parishes came about as the result of levee failures caused by negligent design, negligent maintenance and/or inadequate materials and not by topping of the levees." The complaint also summarizes the testimony of the Chief

of the Army Corps of Engineers that "the Corps neglected to consider the possibility that the levee walls atop the 17th Street Canal levee would lurch away from their footings under significant water pressure and eat away at the earthen barriers below" and that "[t]he levees simply failed to work the way they were supposed to work." Additionally, the complaint alleges that "the levee breach of the Industrial Canal to the Lower Ninth Ward side was caused by an inadequately moored barge that crashed into the levee wall, rupturing the levee and compromising its ability to hold water back."

The *Chehardy* plaintiffs assert in their complaint that each was insured under an all-risk insurance policy and that their losses are covered perils under their all-risk policies. They allege that they timely filed claims with their insurers but their insurers denied coverage and have refused to indemnify them. The *Chehardy* plaintiffs acknowledge that their policies contained flood exclusions, but they assert that these exclusions should not be read so broadly as to disallow coverage for their damages because to do so "would contravene the very purpose of [all-risk] policies." They posit that the reasonable expectations of Louisiana policyholders would be that "flood" would "encompass[ ] overflowing of the Mississippi River, accumulation of water due to heavy rainfalls, or similar phenomena, but not the failing of" the levees "due to negligent conduct beyond [their] control." Additionally, they opine in their complaint that they should not be deprived of coverage where the

insurers "have drafted vague, ambiguous and unclear limitations on coverage"; they allege that although other policies on the market clearly exclude harm caused by the failure of levees, theirs do not.

The *Chehardy* plaintiffs seek a declaratory judgment that the efficient proximate causes of their damage were windstorm, acts of negligence, and storm surge, all of which were covered perils; that "[t]he breaking or failure of boundaries of lakes, reservoirs, rivers, streams, or other bodies of water was a peril not specifically excluded by any of the . . . policies"; and that "[t]he damage caused by water entering the City of New Orleans . . . due to the breaches in the levees . . . neither falls within the regular definition of 'flood,' nor within any of the subject insurance policies' exclusions of 'flood.'" The *Chehardy* plaintiffs also bring claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and insurance bad faith under section 22:1220 of the Louisiana Revised Statutes. Additionally, the plaintiffs bring claims for breach of fiduciary duty against State Farm, Allstate, Liberty Mutual, and other insurers who sell their homeowners insurance policies directly to their customers.

The *Chehardy* plaintiffs did not include in their complaint the pertinent language from their insurance policies, nor did they attach the policies or identify which plaintiff was insured through which defendant. Instead, copies of the policies were attached to the

defendants' motions seeking dismissal of the plaintiffs' claims.[6]

The policies of American, Auto Club, Hanover, Lafayette, Lexington, Liberty Mutual, Standard Fire, and Louisiana Citizens are nearly identical in every respect relevant to this appeal. All of these policies provide coverage for risk of direct physical loss to structures on the property as long as the risk is not an excluded peril. They also provide coverage for

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[6] In its order, the district court stated that it was unable to identify with certainty which *Chehardy* plaintiffs were insured through which defendants:

> The Court has attempted to ascertain this information for purposes of specificity with respect to its ensuing orders herein; however, there is some confusion which prevents the Court from doing so. In addition to which, the information provided is not in the record. However, it has been represented to the Court by counsel that all insurers herein have provided at least one policy to one plaintiff, thus the Court will enter its orders with respect to the insurers and will not be able to identify the specific plaintiff who is [a]ffected by such order.

We examined the record on appeal and identified what appear to be insurance policies corresponding with each named *Chehardy* plaintiff except Wendell Glation and Andre and Marilyn Mauberret. With respect to those plaintiffs, we granted unopposed motions to supplement the record on appeal with copies of their policies. Nevertheless, we leave it to the district court on remand to identify with certainty which plaintiff was insured under which policy (or policies) for the purposes of orders to be entered subsequent to this appeal.

direct physical loss to personal property but only if the loss is caused by an enumerated peril and not by an excluded peril. With respect to both structures and personal property, the policies contain a list of exclusions that are not insured against – among them, flood. The flood exclusions provide:

> We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.
>
> . . . .
>
> . . . Water Damage, meaning:
>
> > . . . Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind. . . . [7]

The Aegis policy is identical in all relevant respects to the above policies, with the exception of the lead-in clause before the flood exclusion. Aegis's policy contains an endorsement deleting the clause that excludes coverage "for loss caused directly or indirectly by" water damage "regardless of any other cause" and replacing it with the following: "We do not

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[7] The only variations in language between these policies are immaterial to this appeal. For example, American and Hanover substitute the words "loss or damage" for "loss," Hanover inserts "any" before "body of water," and Hanover names its exclusion "Water" rather than "Water Damage."

insure for loss caused by any of the following." The effect is that Aegis's flood exclusion reads as follows:

> We do not insure for loss caused by any of the following.
>
> . . . .
>
> . . . Water Damage, meaning:
>
> > . . . Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind. . . .

The Great Northern policies provide coverage for risk of physical loss to the home and its contents except where provided otherwise or excluded by a policy exclusion. The policies contain a "Surface water" exclusion, which provides:

> Surface water. We do not cover any loss caused by:
>
> > • flood, surface water, waves, tidal water, or water borne material from any of these;
> >
> > • overflow of water or water borne material from a body of water;
> >
> > . . .
> >
> > from any source, even if driven by wind.

The policies also define "caused by" as "any loss that is contributed to, made worse by, or in any way results from that peril."

The Allstate policies provide coverage for losses to the dwelling and other structures on the insured property except as limited or excluded in the policies, as well as coverage for losses to personal property caused by certain enumerated causes and subject to exclusions. The policies contain the following flood exclusion:

> We do not cover loss to [insured] property . . . consisting of or caused by:
>
> > . . . Flood, including, but not limited to surface water, waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind.

The State Farm policies in the *Chehardy* action are identical in every relevant respect to the State Farm policies in the *Vanderbrook* action.

Each of the defendants in the *Chehardy* action filed a Rule 12(b)(6) motion to dismiss for failure to state a claim. (The ISO Defendants filed a consolidated motion to dismiss.) The district court addressed only the claims for breach of contract and the request for declaratory relief. With respect to all defendants except State Farm, the court denied the motions to dismiss for the same reasons it denied the motions for judgment on the pleadings in the *Vanderbrook* action. With respect to State Farm, however, the district court granted the motion to dismiss for the same reason it granted State Farm's motion in the *Vanderbrook* action. As to the extra-contractual claims (for

breach of the implied covenant of good faith and fair dealing, insurance bad faith, and breach of fiduciary duty), the district court denied the motions to dismiss without prejudice to their being re-urged at a later time, after the resolution of this appeal.

D. The Humphreys Action

In the *Humphreys* action, plaintiff-appellee-cross-appellant Kelly A. Humphreys filed suit against her insurer, defendant-appellant-cross-appellee Encompass Indemnity Company ("Encompass Indemnity"), in Louisiana state court.[8] Humphreys alleges that as Hurricane Katrina passed through New Orleans, the city "began pumping storm water runoff through various feeder canals into and through the 17th Street and London Avenue drainage canals into Lake Pontchartrain." "As a result of a 'sudden and accidental event' storm water drainage exerted pressure against the storm wall and levee" erected along the canals, "causing the levee and storm wall to collapse" and "result[ing] in storm waters being distributed over large portions of New Orleans." Humphreys alleges that the cause of the collapse was "inadequate maintenance" of the levee and storm wall on the part of the Orleans Levee District. She avers that as a result of these events, her residence "was inundated

[8] Humphreys amended her petition to add the Orleans Levee District as a defendant. Her claims against the Orleans Levee District are not at issue in this appeal.

with approximately 12 inches of storm water causing major damage to building and contents." She asserts that the efficient proximate cause of her loss was the levee and storm-wall collapse, not flood and surface water. Humphreys states that Encompass Indemnity has failed to pay for her losses, which she asserts were covered under her policy. She brings claims for breach of contract and breach of the duty of good faith and fair dealing, and she seeks compensatory damages, attorney's fees, and treble damages under various provisions of Title 22 of the Louisiana Revised Statutes.

Humphreys's homeowners policy with Encompass Indemnity covers direct physical loss to real property, as well as direct physical loss to personal property if caused by an enumerated peril. Both the real-property coverage and the personal-property coverage are subject to exclusions, including the following water-damage exclusion:

> We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.
>
> 1. Real Property and Tangible Personal Property. We do not insure for loss:
>
> a. Caused by water damage, meaning:
>
> (1) Flood, surface water, waves, tidal water, overflow of a body of

> water, or spray from any of these, whether or not driven by wind;

The policy also contains the following "Hurricane Deductible Endorsement": We will pay only that part of the total of the loss for all Property Coverages that exceeds the hurricane deductible stated on the Coverage Summary. The hurricane deductible shown on the Coverage Summary applies to all covered property for direct physical loss or damage caused directly or indirectly by a hurricane as defined below. Such deductible applies regardless of any other cause or event contributing concurrently or in any sequence to the loss. No other deductible provision in the policy applies to direct physical loss caused by a hurricane. In no event will the deductible applied for a hurricane loss be less than the property deductible shown on the Coverage Summary.

Hurricane means wind, wind gust, hail, rain, tornado, cyclone or hurricane which results in direct physical loss or damage to property by a storm system that has been declared to be a hurricane by the National Weather Service. . . .

. . . .

All other provisions of this policy apply.

The *Humphreys* action was removed to federal court. On June 12, 2006, Humphreys and Encompass Indemnity settled and agreed to dismiss with prejudice (pursuant to Rule 41) the wind-damage portion

of Humphreys's claims as well as the entirety of her bad-faith claim. The parties' stipulation of partial dismissal specified that the remaining claim was the "claim to seek recovery for flood/rising water damage" under the policy.

The next day, Humphreys moved for partial summary judgment, asking the district court to rule that her policy provided coverage for flood damage to her residence pursuant to the policy's hurricane-deductible endorsement. At oral argument before the district court, according to the district court's order, Humphreys's counsel also adopted the *Chehardy, Vanderbrook,* and *Xavier* plaintiffs' arguments concerning the ambiguity of the flood exclusion, and the district court therefore construed Humphreys's partial-summary-judgment motion as also extending to the issue of the flood exclusion's applicability.[9]

The district court granted in part and denied in part Humpreys's motion. The court concluded that the hurricane-deductible endorsement did not itself create or extend coverage and denied Humphreys's

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[9] Encompass Indemnity disputes that Humphreys properly asserted the issue of the flood exclusion's applicability in her motion for partial summary judgment. Encompass Indemnity characterizes the district court's grant of partial summary judgment in Humphreys's favor on this issue as sua sponte and contends that it did not receive Rule 56(c)'s requisite notice. Because we conclude that even if Encompass Indemnity did have notice, the grant of partial summary judgment was nonetheless erroneous, we need not address whether Encompass Indemnity received the required notice.

partial-summary-judgment motion on this issue. But for the same reasons that the court construed most of the policies in the *Vanderbrook, Xavier,* and *Chehardy* actions as providing coverage, the court concluded that Humphreys's alleged damage was covered under her policy and granted partial summary judgment in her favor on this issue.

E. Appeal

The district court certified that its orders involved a controlling question of law as to which there is a substantial ground for a difference of opinion and that appeal may materially advance the ultimate termination of the litigation. All appellants and cross-appellants timely sought leave from this court to appeal from the district court's interlocutory order pursuant to 28 U.S.C. § 1292(b), and we granted their requests.

All defendants except State Farm now appeal the district court's order concluding that the water damage resulting from the levee breaches was not excluded by their policies' flood exclusions. The *Chehardy* plaintiffs and the *Vanderbrook* plaintiffs cross appeal the district court's grant of State Farm's motions to dismiss. And Humphreys cross appeals the district court's denial of her motion for partial summary judgment on the issue whether her policy's hurricane-deductible endorsement provides coverage for her losses.

II. STANDARD OF REVIEW

We review de novo the district court's order on a motion to dismiss for failure to state a claim under Rule 12(b)(6). The "court accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit,* 369 F.3d 464, 467 (5th Cir.2004) (quoting *Jones v. Greninger,* 188 F.3d 322, 324 (5th Cir.1999)). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* ___ U.S. ___, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007).[10] "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 1965 (quotation marks, citations, and footnote omitted).

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[10] We have often stated that a claim should not be dismissed under Rule 12(b)(6) unless the plaintiff would not be entitled to relief under any set of facts or any possible theory he may prove consistent with the allegations in the complaint. *See, e.g., Martin K. Eby Constr.,* 369 F.3d at 467 (quoting *Jones,* 188 F.3d at 324). This standard derived from *Conley v. Gibson,* which stated that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). But recently in *Bell Atlantic,* the Supreme Court made clear that the *Conley* rule is not "the minimum standard of adequate pleading to govern a complaint's survival." 127 S.Ct. at 1968-69.

Generally, in deciding a motion to dismiss for failure to state a claim, if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." FED.R.CIV.P. 12(b). In this case, that would normally include the insurance contracts, since those documents were not attached to the complaints. But because the defendants attached the contracts to their motions to dismiss, the contracts were referred to in the complaints, and the contracts are central to the plaintiffs' claims, we may consider the terms of the contracts in assessing the motions to dismiss. *See Causey v. Sewell Cadillac-Chevrolet, Inc.,* 394 F.3d 285, 288 (5th Cir.2004) ("Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim."(citing *Collins v. Morgan Stanley Dean Witter,* 224 F.3d 496, 498-99 (5th Cir.2000))).

We also review de novo the district court's decision on a Rule 12(c) motion for judgment on the pleadings. *See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.,* 313 F.3d 305, 312 (5th Cir.2002) (citing *Hughes v. Tobacco Inst., Inc.,* 278 F.3d 417, 420 (5th Cir.2001)). The standard for deciding such a motion is the same as that for a Rule 12(b)(6) motion to dismiss for failure to state a claim. *See id.* at 313 n. 8; *see also* 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1368 (3d ed.2004). "The central issue is whether, in the light most favorable to the plaintiff,

the complaint states a valid claim for relief." *Great Plains Trust Co.*, 313 F.3d at 312 (citing *Hughes*, 278 F.3d at 420).

We review a grant of summary judgment de novo, viewing all evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *See Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir.2000). "Summary judgment is proper when the evidence reflects no genuine issues of material fact and the non-movant is entitled to judgment as a matter of law." *Id.* (citing FED.R.CIV.P. 56(c)). "A genuine issue of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

III. DISCUSSION

A. Controlling Law

In diversity cases such as these, federal courts must apply state substantive law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Ashland Chem. Inc. v. Barco Inc.*, 123 F.3d 261, 265 (5th Cir.1997). In determining which state's substantive law controls, the court applies the choice-of-law rules of the forum state. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). The parties agree that in these Louisiana actions involving the interpretation

of insurance policies issued in Louisiana for property located in Louisiana, Louisiana's substantive law controls. *Cf. Am. Int'l Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 260 (5th Cir.2003).

To determine Louisiana law, we look to the final decisions of the Louisiana Supreme Court. *See id.* In the absence of a final decision by the Louisiana Supreme Court, we must make an *Erie* guess and determine, in our best judgment, how that court would resolve the issue if presented with the same case. *See id.* In making an *Erie* guess, we must employ Louisiana's civilian methodology, whereby we first examine primary sources of law: the constitution, codes, and statutes. *Id.* (quoting *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 197 (5th Cir.2003)); *Prytania Park Hotel, Ltd. v. Gen. Star Indem. Co.*, 179 F.3d 169 (5th Cir.1999). "Jurisprudence, even when it rises to the level of *jurisprudence constante*, is a secondary law source in Louisiana." *Prytania Park Hotel*, 179 F.3d at 169 (footnote omitted); *see also Am. Int'l Specialty Lines Ins. Co.*, 352 F.3d at 261 (quoting *Transcon. Gas Pipe Line Corp. v. Transp. Ins. Co.*, 953 F.2d 985, 988 (5th Cir.1992)). Thus, although we will not disregard the decisions of Louisiana's intermediate courts unless we are convinced that the Louisiana Supreme Court would decide otherwise, we are not strictly bound by them. *Am. Int'l Specialty Lines Ins. Co.*, 352 F.3d at 261.

Under Louisiana law, "[a]n insurance policy is a contract between the parties and should be construed by using the general rules of interpretation of contracts

set forth in the Louisiana Civil Code." *Cadwallader v. Allstate Ins. Co.*, 848 So.2d 577, 580 (La.2003). The Louisiana Civil Code provides that "[i]nterpretation of a contract is the determination of the common intent of the parties." LA. CIV.CODE ANN. art. 2045 (1987); *see also Cadwallader*, 848 So.2d at 580; *La. Ins. Guar. Assoc. v. Interstate Fire & Cas. Co.*, 630 So.2d 759, 763 (La.1994). An insurance contract must be "construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended, or modified by any rider, endorsement, or application attached to or made a part of the policy." LA.REV.STAT. ANN. § 22:654 (2004). Interpretation of an insurance contract generally involves a question of law. *Bonin v. Westport Ins. Corp.*, 930 So.2d 906, 910 (La.2006) (citing *Robinson v. Heard*, 809 So.2d 943, 945 (La.2002)); *see also La. Ins. Guar. Assoc.*, 630 So.2d at 764.

"The words of a contract must be given their generally prevailing meaning." LA. CIV.CODE ANN. art. 2047 (1987); *see also Cadwallader*, 848 So.2d at 580. "When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent." LA. CIV.CODE ANN. art. 2046 (1987). "If the policy wording at issue is clear and unambiguously expresses the parties' intent, the insurance contract must be enforced as written." *Cadwallader*, 848 So.2d at 580.

Where, however, an insurance policy includes ambiguous provisions, the "[a]mbiguity . . . must be

resolved by construing the policy as a whole; one policy provision is not to be construed separately at the expense of disregarding other policy provisions." *La. Ins. Guar. Ass'n,* 630 So.2d at 763 (citing LA. CIV.CODE ANN. art. 2050 (1987) ("Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole.")). "Words susceptible of different meanings must be interpreted as having the meaning that best conforms to the object of the contract." LA. CIV.CODE ANN. art. 2048 (1987). "A provision susceptible of different meanings must be interpreted with a meaning that renders it effective and not with one that renders it ineffective." *Id.* art. 2049 (1987).

Ambiguity may also be resolved through the use of the reasonable-expectations doctrine – i.e., "by ascertaining how a reasonable insurance policy purchaser would construe the clause at the time the insurance contract was entered." *La. Ins. Guar. Ass'n,* 630 So.2d at 764 (quoting *Breland v. Schilling,* 550 So.2d 609, 610-11 (La.1989)). "The court should construe the policy 'to fulfill the reasonable expectations of the parties in light of the customs and usages of the industry.'" *Id.* (quoting *Trinity Indus., Inc. v. Ins. Co. of N. Am.*, 916 F.2d 267, 269 (5th Cir.1990)). "A doubtful provision must be interpreted in light of the nature of the contract, equity, usages, the conduct of the parties before and after the formation of the contract, and of other contracts of a like nature

between the same parties." LA. CIV.CODE ANN. art. 2053 (1987).

"If after applying the other general rules of construction an ambiguity remains, the ambiguous contractual provision is to be construed against the drafter, or, as originating in the insurance context, in favor of the insured." *La. Ins. Guar. Ass'n,* 630 So.2d at 764. Article 2056 of the Louisiana Civil Code provides: "In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text. A contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party." LA. CIV.CODE ANN. art. 2056 (1987). "Under this rule of strict construction, equivocal provisions seeking to narrow an insurer's obligation are strictly construed against the insurer." *Cadwallader,* 848 So.2d at 580. "That strict construction principle applies only if the ambiguous policy provision is susceptible to two or more *reasonable* interpretations; for the rule of strict construction to apply, the insurance policy must be not only susceptible to two or more interpretations, but each of the alternative interpretations must be reasonable." *Id.* The fact that a term is not defined in the policy itself does not alone make that term ambiguous. *Am. Deposit Ins. Co. v. Myles,* 783 So.2d 1282, 1287 (La.2001).

"An insurance contract, however, should not be interpreted in an unreasonable or strained manner under the guise of contractual interpretation to enlarge or restrict its provisions beyond what is

reasonably contemplated by unambiguous terms or achieve an absurd conclusion." *Cadwallader,* 848 So.2d at 580. "Courts lack the authority to alter the terms of insurance contracts under the guise of contractual interpretation when the policy's provisions are couched in unambiguous terms." *Id.*

The policies in this case – which are homeowners, renters, and commercial-property policies – are all-risk policies. All-risk policies "create[ ] a special type of coverage that extends to risks not usually covered under other insurance; recovery under an all-risk policy will be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage." *Alton Ochsner Med. Found. v. Allendale Mut. Ins. Co.,* 219 F.3d 501, 504 (5th Cir.2000) (applying Louisiana law) (citing *U.S. Indus., Inc. v. Aetna Cas. & Sur. Co.,* 690 F.2d 459, 461 (5th Cir.1982)). Insurers may, however, limit their liability under all-risk policies: "[A]bsent a conflict with statutory provisions or public policy, insurers, like other individuals, are entitled to limit their liability and to impose and to enforce reasonable conditions upon the policy obligations they contractually assume." *Carbon v. Allstate Ins. Co.,* 719 So.2d 437, 440 (La.1998) (citing *La. Ins. Guar. Assoc.,* 630 So.2d at 763); *see also Bonin,* 930 So.2d at 911. But "[e]xclusionary provisions in insurance contracts are strictly construed against the insurer, and any ambiguity is construed in favor of the insured." *Ledbetter v. Concord Gen. Corp.,* 665 So.2d 1166, 1169 (La.2006)

(citing *Garcia v. St. Bernard Parish Sch. Bd.*, 576 So.2d 975, 976 (La.1991)).

B. Flood Exclusions

The plaintiffs contend that their policies' flood exclusions do not unambiguously exclude coverage for losses caused by an inundation of water resulting from a breached levee where the breach occurred in part because the levee was negligently designed, constructed, or maintained. The plaintiffs urge us to conclude that the term "flood" is ambiguous in this context and that the policies must be construed in favor of coverage. By contrast, the insurers maintain that the policies unambiguously exclude coverage for the inundation of water resulting from the breached levees.

The Louisiana Supreme Court has not interpreted a flood exclusion in the context of breached levees. We must therefore make an *Erie* guess and determine, in our best judgment, how that court would resolve the issue if presented with this case.[11] *Am. Int'l Specialty Lines Ins. Co.*, 352 F.3d 254 at 260.

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[11] The motions of Xavier and the *Chehardy* plaintiffs to certify the questions raised in this appeal to the Louisiana Supreme Court pursuant to Rule XII of the Louisiana Supreme Court Rules are denied. Although we acknowledge that the Louisiana Supreme Court has not issued a definitive ruling on the interpretation of a flood exclusion in the context of the facts before us, this is not alone sufficient to warrant certification. *See Jefferson v. Lead Indus. Ass'n, Inc.*, 106 F.3d 1245, 1247 (5th

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The plaintiffs first contend that because the term "flood" is not defined in the policies, it is ambiguous – indeed, the *Chehardy* plaintiffs say that the term's undefined status makes it per se ambiguous – requiring us to construe the term in favor of coverage. But the fact that a term used in an exclusion "is not defined in the policy itself . . . alone does not make the exclusion ambiguous; instead, [the court] will give the term its generally prevailing meaning." *Am. Deposit Ins. Co.*, 783 So.2d at 1287 (citing LA. CIV.CODE art. 2047); *see also Hendricks v. Am. Employers Ins. Co.*, 176 So.2d 827, 830 (La.Ct.App.1965);[12] *accord Bay Cities*

Cir.1997) (per curiam) ("Alone, the absence of a definitive answer from the state supreme court on a particular question is not sufficient to warrant certification."). Because the rules of contract interpretation set forth in the Louisiana Civil Code provide us with an adequate basis to decide this appeal, we decline the certification requests. *Cf. Swearingen v. Owens-Corning Fiberglas Corp.*, 968 F.2d 559, 564 (5th Cir.1992) (refusing to certify question where "decisional analysis is relatively straightforward").

[12] The *Chehardy* plaintiffs cite *Hendricks* for the proposition that if an insurance company fails to define a pertinent term of the policy or exclusionary provision, the court must adopt the meaning of that term most favorable to the policyholders. But *Hendricks* states: "Where . . . a particular word or phrase is not defined [in the insurance policy], the courts will endeavor by means of generally accepted legal techniques to ascertain the common and popular meaning of such word or phrase." 176 So.2d at 830. Rather than immediately construe the undefined term in favor of the insured, the *Hendricks* court first looked to dictionary definitions and other cases to determine if the term was ambiguous. *See id.* at 830-31.

The *Chehardy* plaintiffs also cite *Arnette v. NPC Services, Inc.*, 808 So.2d 798 (La.Ct.App.2002). In that case the term

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Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co., 5 Cal.4th 854, 21 Cal.Rptr.2d 691, 855 P.2d 1263, 1270 (1993) (rejecting rule that absence of definition makes term ambiguous even where term has generally accepted meaning and stating: "[A]ny rule that rigidly presumed ambiguity from the absence of a definition would be illogical and unworkable. To avoid the ambiguity perceived . . . , an insurer would have to define every word in its policy, the defining words would themselves then have to be defined, their defining words would have to be defined, and the process would continue to replicate itself until the result became so cumbersome as to create impenetrable ambiguity.").

The plaintiffs also maintain that because the insurers could have more explicitly excluded floods that are caused in part by negligence, their failure to

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being construed was "professional duty" in the context of a professional-liability exclusion. The *Arnette* court did state: "Further, because 'professional duty' is undefined in the First State policy, we conclude the professional liability exclusion is ambiguous and must be construed in favor of NUS and against First State." *Id.* at 803. But the term "professional duty," unlike "flood," lacks any generally prevailing meaning in common parlance, and it thus provided no clear indication of what coverage was being excluded. *Arnette* cannot stand for the proposition that even though a term has a generally accepted meaning outside the context of the policy, the policy's failure to define it nonetheless makes it ambiguous; otherwise *Arnette* would conflict with article 2047's command to give the words of a contract their generally prevailing meaning. *See* LA. CIV.CODE ANN. art. 2047.

do so in these policies makes the flood exclusions ambiguous. Specifically, the *Chehardy* plaintiffs point to evidence that before Hurricane Katrina struck, the insurer defendants knew about the availability of policy forms that more explicitly excluded floods caused in part by man but that they elected not to amend their policies' language accordingly. Xavier, which was insured through Travelers, also points to its policy's "earth movement" exclusion, which excludes earth movements "whether natural or man made"; Xavier asserts that Travelers thus knew how to clearly exclude man-made floods but did not do so. Similarly, the district court compared the flood exclusions in most of the policies with those in the policies of State Farm and Hartford Insurance Company of the Midwest,[13] remarking that those insurers succeeded with little effort in clearly excluding water damage resulting from negligent acts and that the other insurers could have done so as well.

But the fact that an exclusion could have been worded more explicitly does not necessarily make it ambiguous. *See La. Ins. Guar. Ass'n,* 630 So.2d at 766 ("[T]hough . . . the Interstate policy could have more clearly delineated its payment obligation, 'that fact

[13] Hartford Insurance Company of the Midwest ("Hartford") was a defendant in the *Vanderbrook* action. The district court granted Hartford's motion to dismiss for failure to state a claim because its policy explicitly excluded coverage for loss caused by release of water held by a levee. The *Vanderbrook* plaintiffs do not appeal this aspect of the district court's order, and Hartford is therefore not a party to this appeal.

does not mandate the conclusion that the policy was legally ambiguous.'" (quoting *Garmany v. Mission Ins. Co.*, 785 F.2d 941, 945-46 (11th Cir.1986))). Nor does the fact that other policies have more explicitly defined the scope of similar exclusions. As the Louisiana Supreme Court stated in *Cadwallader* when interpreting the term "relative":

> The appellate court further erred in reaching a conclusion that because some insurance policies specifically include foster children in their policy definition of "relative" or "family member," the term "relative" is somehow rendered ambiguous in the policy at issue. In making this assumption, the appellate court ignored the fundamental precept that it was required to interpret the term using its plain, ordinary and generally prevailing meaning as set forth in the policy at hand. . . . It is the particular insurance policy of the insured that establishes the limits of liability and it is well established that this contract of insurance is the law between the parties. When we find the contract of insurance is clear and unambiguous . . . we must enforce the policy as written.

848 So.2d at 583. We therefore reject the plaintiffs' arguments that the flood exclusions in the policies

before us are ambiguous in light of more specific language used in other policies.[14]

Furthermore, even where the scope of an exclusion is not readily apparent, we do not immediately construe that exclusion in favor of coverage. Instead, we first apply the general rules of contract construction set forth in the Civil Code. *La. Ins. Guar. Ass'n,* 630 So.2d at 764. Under those rules, we give the words of a contract their "generally prevailing meaning." LA. CIV.CODE ANN. art. 2047. Dictionaries, treatises, and jurisprudence are helpful resources in ascertaining a term's generally prevailing meaning. *See Gregor v. Argenot Great Cent. Ins. Co.,* 851 So.2d 959, 964 (La.2003) ("Dictionaries are a valuable source for determining the 'common and approved usage' of words."); *Cadwallader,* 848 So.2d at 581-83 (looking to dictionaries, treatises, and jurisprudence to interpret the term "relative"). When the words of a policy provision are clear and unambiguous in the context of the facts of the case and do not lead to an absurd result, we apply the provision as written without any further interpretation. *See Cloud v. Nat'l Auto. Ins. Co.,* 875 So.2d 866, 870 (La.Ct.App.2004); LA. CIV.CODE ANN. art. 2046.

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[14] To the extent that the plaintiffs also argue that the language of the other policies may be used to resolve ambiguity (not simply to demonstrate that an ambiguity exists), we need not look to other policies because the flood exclusions in the policies before us are unambiguous in the context of these facts.

To ascertain the generally prevailing meaning of the term "flood," we begin by considering dictionary definitions of the term. Each of the dictionaries we have accessed lists more than one definition of "flood," but the existence of more than one definition of a term does not itself make the term ambiguous. *Citation Ins. Co. v. Gomez,* 426 Mass. 379, 688 N.E.2d 951, 953 (1998); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY Explanatory Notes at 17a n.12.4 (2002) (explaining that when a word has multiple definitions, the best definition "is the one that most aptly fits the context of an actual genuine utterance"). Likewise, when "a word has two meanings, one broad and one more restrictive included within the broader meaning, it does not follow that the narrower meaning was intended." *Comm. Union Ins. Co. v. Advance Coating Co.,* 351 So.2d 1183, 1186 (La.1977); *see also Falgout v. Walter Jester, Hampton Inc.,* 883 So.2d 515, 520 (La.Ct.App.2004).

The Oxford English Dictionary has two pertinent definitions of "flood": (1) "[a]n overflowing or irruption[15] of a great body of water over land not usually submerged; an inundation, a deluge" and (2) "[a] profuse and violent outpouring of water; a swollen stream, a torrent; a violent downpour of rain, threatening an inundation." 5 OXFORD ENGLISH DICTIONARY

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[15] "Irruption" is "[t]he action of bursting or breaking in; a violent entry, inroad, incursion, or invasion, esp[ecially] of a hostile force or tribe." 8 OXFORD ENGLISH DICTIONARY 104 (2d ed.1989).

1075-76 (2d ed.1989). Webster's Dictionary defines "flood" as "a rising and overflowing of a body of water that covers land not usu[ally] under water . . . [;] an outpouring of considerable extent . . . [;] a great downpour." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 873 (2002). The sixth edition of Black's Law Dictionary defines "flood" as follows: "An inundation of water over land not usually covered by it. Water which inundates area of surface of earth where it ordinarily would not be expected to be." BLACK'S LAW DICTIONARY 640 (6th ed.1990). "Flood" itself is not defined in the current (eighth) edition of Black's Law Dictionary, but "floodwater" is defined as "[w]ater that escapes from a watercourse in large volumes and flows over adjoining property in no regular channel." BLACK'S LAW DICTIONARY 1622 (8th ed.2004). The most straightforward definition comes from the American Heritage Dictionary: "An overflowing of water onto land that is normally dry." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 674 (4th ed.2000). Finally, of particular interest is the discussion of "flood" in the Columbia Encyclopedia, which specifically includes in the definition the inundation of water resulting from the bursting of a levee:

> [I]nundation of land by the rise and overflow of a body of water. Floods occur most commonly when water from heavy rainfall, from melting ice and snow, or from a combination of these exceeds the carrying capacity of the river system, lake, or ocean into which it runs. . . .

> . . . Less predictable are *floods resulting from . . . the bursting of a natural or man-made dam or levee.*
>
> . . . .
>
> In the United States the Johnstown, Pa., flood of 1889, in which thousands of lives were lost, was caused by the breaking of an earth dam above the city.

COLUMBIA ENCYCLOPEDIA 1002 (6th ed.2000) (emphasis added).

We also consider the definitions of "flood" in treatises. Appleman's Insurance Law and Practice defines "flood waters" as "those waters above the highest line of the ordinary flow of a stream, and generally speaking they have overflowed a river, stream, or natural water course and have formed a continuous body with the water flowing in the ordinary channel." 5 JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 3145 (1970). And Couch on Insurance defines "flood" as "the overflow of some body of water that inundates land not usually covered with water." STEVEN PLITT ET AL., COUCH ON INSURANCE § 153:54 (3d ed.2006) [hereinafter COUCH]. Couch also states that the term "flood" is generally unambiguous. *Id.* § 153:49.

Additionally, we look to jurisprudence, both from Louisiana courts and from courts outside Louisiana. In *Riche v. State Farm Fire & Casualty Co.*, an intermediate Louisiana court interpreted a policy's

exclusion for "flood, surface water, tidal water or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not." 356 So.2d 101, 103 (La.Ct.App.1978). The plaintiff in *Riche* was fishing in a boat on a lake when a windstorm caused the boat to sink, *id.* at 103, and he sought recovery under his homeowners insurance policy for the loss of his fishing gear, which was on the boat when it sank, *id.* at 102. The court held that the exclusion did not preclude the plaintiff's recovery, reasoning that the "exclusion, when read as a whole, contemplates only such damage caused by water which has risen over and covered areas not ordinarily covered by water" and does not extend to "damage caused by windstorm (or resulting waves) over a body of water, such as a lake or reservoir." *Id.* at 103-04. *Riche*, however, is of limited value in this case because its determination was simply that a water-damage exclusion applied only to losses that occurred on areas not normally covered by water (i.e., dry land) and not to a loss occurring on a body of water. *See id.* at 103-04; *see also* COUCH, *supra,* at § 153:54 (citing *Riche* for the proposition that "[b]ecause a flood is generally understood to mean the inundation of land, claims by insurers that the inundation of a boat on the water is an excluded flood are generally unsuccessful"). Unlike in *Riche*, the losses in this case occurred on land that is normally dry.

Where courts outside Louisiana have considered whether a flood exclusion similar to the ones here unambiguously precludes coverage for water damage

resulting from the failure of a structure such as a dam or dike, they have uniformly declared that the inundation of water falls within the language of the exclusion. Russell G. Donaldson, Annotation, *What is "Flood" Within Exclusionary Clause of Property Damage Policy,* 78 A.L.R.4th 817 (1990 & Supp.2007) (citing *Kane v. Royal Ins. Co. of Am.,* 768 P.2d 678 (Colo.1989); *Bartlett v. Cont'l Divide Ins. Co.,* 697 P.2d 412 (Colo.Ct.App.1984); and *E.B. Metal & Rubber Indus., Inc. v. Fed. Ins. Co.,* 84 A.D.2d 662, 444 N.Y.S.2d 321 (N.Y.App.Div.1981)).[16]

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[16] The plaintiffs argue that *E.B. Metal,* which involved a broken dike, may be distinguished because the flood exclusion in that case included in the definition of "flood" the phrase "rising (including overflowing or *breaking of boundaries*) of lakes, reservoirs, rivers, streams, or other bodies of water." 84 A.D.2d at 662-63 (emphasis added). The plaintiffs assert that "breaking of boundaries" would include breaches of levees. We agree that *E.B. Metal*'s rationale may not be fully applicable to this case on this basis. Nevertheless, the plaintiffs have not directed us to any authority contradicting the proposition that in the context of a broken dam, levee, or other similar structure, courts have reached a consensus that the term "flood" is unambiguous and that flood exclusions preclude recovery.

We also do not include in our analysis *TNT Speed & Sport Center, Inc. v. American States Insurance Co.,* 114 F.3d 731 (8th Cir.1997), or *Pakmark Corp. v. Liberty Mutual Insurance Co.,* 943 S.W.2d 256 (Mo.Ct.App.1997), because the parties in those cases did not dispute that a flood had occurred. Nor do we rely on *Florida East Coast Railway v. United States,* 519 F.2d 1184 (5th Cir.1975), or other cases interpreting the phrase "floods or flood waters" in 33 U.S.C. § 702c, which grants the United States immunity for damage resulting from floods, because the scope of the government's immunity may be broader than the

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The most prominent such case is *Kane,* which arose in the context of the failure of the Lawn Lake Dam in Colorado. *See* 768 P.2d at 679. As a result of the dam failure, water swept into the Fall River and inundated the plaintiffs' insured property, causing extensive damage. *Id.* The plaintiffs argued that their all-risk policies provided coverage for the damage, even though the policies contained flood exclusions.[17] *Id.* at 680. The Colorado Supreme Court rejected this argument and construed the term "flood" as extending to the water damage resulting from the dam failure. The court relied in part on dictionary definitions and the definition of "flood" in Appleman's treatise and observed that "[t]he inundation of insureds' normally dry land falls squarely within these generally accepted definitions of the term 'flood.'" *Id.* at 681. Concluding that the term was unambiguous

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exclusions in the policies before us, which we must strictly construe. *See Ledbetter,* 665 So.2d at 1169.

[17] The flood exclusions in *Kane* provided:

> The Company shall not be liable for loss:
>
> . . . .
>
> 12. caused by, resulting from, contributed to, or aggravated by any of the following:
>
> . . . .
>
> (b) flood, surface water, waves, tidal water or tidal waves, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not.

768 P.2d at 679-80 (omissions in original).

in light of its generally accepted meaning and in the context of the facts of the case, the court declared that "there is no doubt that this large-scale inundation of water was a 'flood.'" *Id.*[18]

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[18] The district court attempted to distinguish *Kane* in three ways, none of which withstands scrutiny. First, the district court opined that *Kane* "applied the broadest possible definition" of the term "flood," whereas Louisiana law requires exclusions to be narrowly construed. It is not clear on what basis the district court believed *Kane* applied the broadest possible definition. The *Kane* court stated that it simply determined that in the context of the facts before it, the flood exclusion was unambiguous, and it applied the exclusion as written. This is entirely consistent with Louisiana law. *See Cadwallader*, 848 So.2d at 580 ("If the policy wording at issue is clear and unambiguously expresses the parties' intent, the insurance contract must be enforced as written.").

Second, the district court erroneously inferred that the failure of the Lawn Lake Dam in *Kane* resulted from water overtopping the dam. The court opined that this factually distinguished *Kane* from the case before us, where the allegations are not that the levees were overtopped but that they collapsed when faced with conditions they should have withstood. The district court relied on the following statement in *Kane*: "Although leakage from a ruptured city water line does not fall within [Appleman's] definition [of 'flood'], the *rising and overflowing* of Fall River does. . . . [T]he Fall River clearly *overflowed* above the highest line of its ordinary flow." *Kane*, 768 P.2d at 682 (emphases added; brackets and quotation marks omitted). But *Kane* never stated nor implied that water overtopped the *dam*; instead, it stated that the *river*, which was downstream from the dam, overflowed its ordinary boundaries due to the large volume of water pouring in from the failed dam.

Third, the district court observed that it was unclear from *Kane* whether Colorado follows the doctrine of efficient proximate cause, pointing to the clause: "the 'efficient moving cause'

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In *Wallis v. Country Mutual Insurance Co.*, an Illinois intermediate court stated that the "plain and ordinary meaning" of "flood" is "water that escapes from a watercourse in large volumes and flows over adjoining property in no regular channel ending up in an area where it would not normally be expected." 309 Ill.App.3d 566, 243 Ill.Dec. 344, 723 N.E.2d 376, 383 (2000). The court held that it was immaterial that a particular watercourse was originally man-made as long as it had a defined bed, visible banks, and a recurrent water flow. *See id.* Indeed, the court observed that a permanent watercourse with these characteristics is considered a natural watercourse. *See id.* at 382; *see also* BLACK'S LAW DICTIONARY 1623 (8th ed. 2004) ("If [a man-made] watercourse is of a permanent character and has been maintained for a sufficient length of time, it may be considered a natural watercourse. . . ."). Accordingly, the *Wallis* court held that water that had overflowed a man-made creek's banks and damaged the plaintiff's house was a flood within the plain and ordinary meaning of the term, *id.* at 383, and that the plaintiff's loss was

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rule, if it were to be adopted by this court." *Id.* at 685. Assuming without deciding that Louisiana does follow the efficient-proximate-cause doctrine, the doctrine has no impact on how a term within a policy exclusion should be construed. The doctrine comes into play only when both a covered loss and an excluded loss are identified. *See Pieper v. Commercial Underwriters Ins. Co.*, 59 Cal.App.4th 1008, 69 Cal.Rptr.2d 551, 557 (1997). This distinction therefore is immaterial.

excluded by his insurance policy's flood exclusion, *id.* at 384.

In light of these definitions, we conclude that the flood exclusions are unambiguous in the context of this case and that what occurred here fits squarely within the generally prevailing meaning of the term "flood." When a body of water overflows[19] its normal boundaries and inundates an area of land that is normally dry, the event is a flood. This is precisely what occurred in New Orleans in the aftermath of Hurricane Katrina. Three watercourses – the 17th Street, Industrial, and London Avenue Canals – overflowed their normal channels, and the levees built alongside the canals to hold back their floodwaters failed to do so. As a result, an enormous volume of water inundated the city. In common parlance, this event is known as a flood.

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[19] The district court noted the presence of the word "overflowing" in many of the dictionary definitions and explicitly equated "overflowing" with "overtopping" (even though the term "overtopping" was nowhere to be found in the definitions), referring to the definitions as "the 'overtopping' definitions." Since the levees' failures here are not alleged to have occurred due to water overtopping the levees, the court inferred that the breaches did not result in a flood. But the court's substitution of "overtopping" for "overflowing" was erroneous. "Overflow" means (1) "[t]o flow over; to overspread or cover with water or other liquid; to flood, inundate"; (2) "[t]o pass or spread over like a flood, so as to pervade, fill, cover, submerge, overwhelm, etc."; and (3) "[t]o flow over (the brim, banks, or sides)." 10 OXFORD ENGLISH DICTIONARY 1086. This is much broader than "overtop," which means "[t]o rise over or above the top of; to surpass in height, surmount, tower above, top." *Id.* at 1131.

Additionally, a levee is a *flood*-control structure; its very purpose is to prevent the floodwaters of a watercourse from overflowing onto certain land areas, i.e., to prevent floods from becoming more widespread. *See* 50 AM.JUR.2D *Levees and Flood Control* § 1 (2006) (defining "levee" as "an embankment constructed along the edge of a river to prevent flooding" and describing levees as one of three principal means of flood prevention and control); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1300 (2002) (defining "levee" as "an embankment designed to prevent flooding"). By definition, whenever a levee ruptures and fails to hold back floodwaters, the result is a more widespread flood. That a levee's failure is due to its negligent design, construction, or maintenance does not change the character of the water escaping through the levee's breach; the waters are still floodwaters, and the result is a flood.

The plaintiffs, however, attempt to inject ambiguity into the term "flood" by asserting that a reasonable interpretation of the term is that it refers only to inundations of water with "natural" causes, not those with a "non-natural" cause. The plaintiffs rely primarily on cases interpreting flood exclusions in the context of broken water mains. They also assert, applying two canons of construction, *noscitur a sociis* and *ejusdem generis,* that a flood includes only natural events because the other terms in the water-damage exclusions are natural phenomena. Additionally, they contend that a reasonable policyholder

would expect that only naturally occurring floods would be excluded.

Before we address these contentions, we first question the notion that the flood in this case was non-natural. The plaintiffs focus on the alleged negligent design, construction, or maintenance of the levees as being the cause of the flood, and we accept as true (for the purpose of assessing the motions to dismiss) their allegation that the canals' floodwaters would not have reached their property had the negligence not occurred. This focus, however, ignores the sizeable natural component to the disaster: a catastrophic hurricane and the excess water associated with it. The non-natural component is simply that in certain areas, man's efforts to mitigate the effect of the natural disaster failed, with devastating consequences. But if man's failure to adequately prepare for a natural disaster could alone transform the disaster into a non-natural event outside the scope of a policy's exclusion, it is difficult to conceive how an insurer could ever exclude the resulting loss; any natural event could be recharacterized as non-natural either because man's preventative measures were inadequate or because man failed to take preventative measures at all.

Even if we accept the plaintiffs' characterization of the flood in this case as non-natural, we disagree that the term "flood" in this context is limited to natural events. The plaintiffs first maintain that dictionary definitions support their interpretation, but the dictionaries we have reviewed make no distinction

between floods with natural causes and those with non-natural causes.[20] Indeed, the Columbia Encyclopedia specifically states that a flood may result from the bursting of a levee. *See* COLUMBIA ENCYCLOPEDIA 1002. Similarly, Appleman's treatise states: "A 'flood,' contemplated by the exclusion, can result from either natural or artificial causes." 5 JOHN ALAN APPLEMAN & JEAN APPLEMAN, *supra*, at § 3145 (Supp.2007) (citing *Kane,* 768 P.2d 678).

The plaintiffs next rely heavily on a line of cases, arising in the context of broken water mains, holding that the term "flood" in a policy's exclusion was ambiguous based on a distinction between natural and non-natural events. For example, in *Ferndale Development Co. v. Great American Insurance Co.*, a Colorado intermediate court observed that "[s]everal cases have held that ['flood'] appl[ies] only in cases

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[20] Xavier points to the mentioning of "Act of God" in the sixth edition of Black's Law Dictionary's definition of "flood" as authority for limiting floods to natural events. Since an "Act of God" is "[a]n act occasioned exclusively by forces of nature without the interference of any human agency," BLACK'S LAW DICTIONARY 33 (6th ed.1990), Xavier posits that for an event to be a flood, it must be purely natural. But Black's Law Dictionary does not include "Act of God" in the definition of "flood" or indicate that they are entirely synonymous; it instead cross-references (i.e., it states, "*See also*") "Act of God" at the end of the definition. *See id.* at 640. This singular cross-reference is not sufficient to persuade us that the dictionary definitions of "flood" limit it to purely naturally occurring events. Furthermore, as we explained, the flood occurred here in the context of an enormous hurricane, and it thus had a significant natural component.

where 'natural' water sources are involved and it concluded that the term was ambiguous and thus did not extend to water from a burst water main. 34 Colo.App. 258, 527 P.2d 939, 940 (1974); *see also Ebbing v. State Farm Fire & Cas. Co.*, 67 Ark.App. 381, 1 S.W.3d 459 (1999) (following *Ferndale* and concluding that "the term 'flood' is unambiguous but that its common usage applies to water occasioned from natural events rather than a burst water main"). Similarly, a New York intermediate court held that a flood exclusion did not apply in the context of a broken water main because the term "flood" "connotes an inundation; a deluge." *Popkin v. Sec. Mut. Ins. Co. of N.Y.*, 48 A.D.2d 46, 48, 367 N.Y.S.2d 492 (N.Y.App.Div.1975). That court also opined that even if the term "flood" is to be read broadly so as to include any "great quantity" of water, the term should be construed in light of the other terms in the exclusion (surface water, waves, tidal water, tidal wave, etc.), which it stated "relate to natural phenomena." *Id.*; *see also Ender v. Nat'l Fire Ins. Co. of Hartford*, 169 A.D.2d 420, 421, 563 N.Y.S.2d 85 (N.Y.App.Div.1991) (following *Popkin* and concluding that flood exclusion did not bar recovery for damage resulting from water-main break because the exclusion "preclude[d] only recovery for damages arising from natural causes, not from artificial devices"); *cf. Mellon v. Hingham Mut. Fire Ins. Co.*, 19 Mass.App.Ct. 933, 472 N.E.2d 674, 675 (1984) (concluding that exclusion for "water below the surface of the ground" did not exclude damage from drainage pipe's rupture because the "loss was caused by an accidental break rather than a natural occurrence"

and, as a fortuity, was "the kind of risk an 'all risk' policy is designed to cover").[21]

Although we do not quibble with the results reached in the water-main cases, we do not believe that a distinction between natural and non-natural causes is applicable in this context. First, unlike a canal, a water main is not a body of water or watercourse. Many (although not all) dictionary definitions define "flood" as an overflow or inundation of a body of water or watercourse.[22] Likewise, Appleman's

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[21] The plaintiffs also rely on cases interpreting "earth movement" exclusions in insurance policies. Such exclusions typically define "earth movement" as including earthquake, volcanic eruption, landslide, subsidence, mud flow, sink hole, erosion, sinking, shifting, and settling. *See, e.g., Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 509 S.E.2d 1, 8 (1998). "A small majority of jurisdictions hold that [such] exclusions do not apply to earth movements that are non-natural in origin or source." COUCH, *supra*, at § 153:65 (collecting cases); *see also id.* §§ 153:66–67; *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So.2d 1082, 1086–89 (Fla.2005); *Murray*, 509 S.E.2d at 4–5, 10; *Peuch State Uniform Serv., Inc. v. Am. Ins. Co.*, 507 F.2d 996, 1000 (5th Cir.1975) (applying Georgia law).

We do not question the holdings or the rationale of the earth-movement cases. But the usefulness of a distinction between natural and non-natural causes in one context does not necessarily mean that the distinction is warranted in an unrelated context. These two contexts are unrelated in part because the term "earth movement," unlike "flood," does not have a generally prevailing meaning in common parlance. And as we explain, a distinction between natural and non-natural causes in the context of a broken levee would be unworkable and would yield absurd results.

[22] The Oxford English Dictionary and Webster's Dictionary refer to "body of water." 5 OXFORD ENGLISH DICTIONARY

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treatise observes that flood waters generally come from a "river, stream, or natural water course."[23] 5 JOHN ALAN APPLEMAN & JEAN APPLEMAN, *supra,* at § 3145. So where a water-main break is involved, it is less clear that the flow of water is within the generally prevailing meaning of "flood." *See Kane,* 768 P.2d at 681 (reasoning that in the context of a ruptured water main, the term "flood" is ambiguous in part "because a water main is not so clearly a body of water" (quotation marks omitted)); *Wallis,* 243 Ill.Dec. 344, 723 N.E.2d at 383 (distinguishing between rupture of water main and overflow of watercourse, regardless of whether the watercourse was originally man-made or forged from nature). Couch on Insurance recognizes a distinction between water-main breaks and the overflow of a body of water and opines that the body-of-water delineation is more useful than the natural/non-natural distinction in determining whether an event is a flood.

1975-76, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 873. Black's Law Dictionary refers to "watercourse." BLACK'S LAW DICTIONARY 1622 (8th ed.2004). And the Columbia Encyclopedia refers to "river system, lake, or ocean." COLUMBIA ENCYCLOPEDIA 1002.

[23] A man-made watercourse may be considered natural if it is permanent and has been maintained for a sufficient length of time. BLACK'S LAW DICTIONARY 1623 (8th ed.2004); *see also Wallis v. Country Mut. Ins. Co.*, 309 Ill.App.3d 566, 243 Ill.Dec. 344, 723 N.E.2d 376, 382 (2000) (stating that a permanent watercourse with a defined bed, visible banks, and a recurrent water flow is considered natural, even if it was originally man-made).

Some jurisdictions attempt to distinguish naturally occurring floods from inundations from artificial or man-made causes such as dams or water mains. Such distinctions lead to apparent inconsistencies. For example, an inundation from the failure of a dam is considered a flood, while water pouring from a broken water main is not a flood. Therefore, distinguishing events based on whether the inundation had a natural or artificial cause may be unhelpful, especially if the policy itself does not make such a distinction. Instead, the key to reconciling these cases lies in the common definition of a flood as an overflow from a body of water. Thus, when the inundation results from the overflow of a body of water, whether natural or artificial, the event is a flood. Conversely, if the inundation does not arise from the overflow of a body of water, as when a water main breaks, the event is not a flood.

COUCH, *supra*, at § 153:54 (footnotes omitted).[11]

Second, the amount of water generally released from a broken water main is not comparable to the massive inundation of water that occurred when the levees in New Orleans ruptured. *Cf. Kane*, 768 F.2d at

[11] Xavier's counsel contended at oral argument that the canals in this case were not bodies of water because they were man-made. We disagree; the canals in this case are plainly watercourses, regardless of their man-made genesis. And a flood may result from the overflow of a watercourse regardless of whether it was man-made. *See Wallis*, 243 Ill.Dec. 344, 723 N.E.2d at 353.

681 (distinguishing water-main cases on the basis that the amount of water released from a broken water main is "less clearly an inundation or deluge" (quotation marks omitted)). A broken water main or other pipe would generally be expected to produce more localized water damage and lacks the same potential to inundate large swaths of land that a breached levee or a failed dam would have. Although the plaintiffs argue that the quantity of water involved should make no difference and that the key inquiry instead should be the cause of the water damage, inherent in the definition of "flood" is the concept of inundation or deluge, and it seems apparent that the greater the inundation involved in an event, the more clearly that event is a flood. *See Popkin*, 48 A.D.2d at 48, 367 N.Y.S.2d 492 (concluding that flood exclusion does not encompass water-main break because the term "flood" "connotes an inundation, a deluge").

Third, and most important, unlike water mains, levees are flood-control structures, which by definition means that they interact with floodwaters. Because levees are man-made, one could point to man's influence nearly any time a levee fails. If a levee fails despite not being overtopped by the floodwaters, it is because the levee was not adequately designed, constructed, or maintained. If a levee fails due to the floodwaters overtopping it or loosening its footings, it is because the levee was not built high enough or the footings were not established strongly or deeply enough. Even where a levee does not fail,

one could find a non-natural flood; where a properly designed and constructed levee causes floodwaters to be diverted downstream to another area of land, the resulting flood downstream occurs because the levee performs as designed. Any time a flooded watercourse encounters a man-made levee, a non-natural component is injected into the flood, but that does not cause the floodwaters to cease being floodwaters. *Cf. Smith v. Union Auto. Indem. Co.*, 323 Ill.App.3d 741, 257 Ill.Dec. 81, 752 N.E.2d 1261, 1267 (2001) (concluding that surface water does not lose its characterization as surface water simply because it is touched or affected by man-made structures). The distinction between natural and non-natural causes in this context would therefore lead to absurd results and would essentially eviscerate flood exclusions whenever a levee is involved. Consequently, we decline to follow this approach in this case. *See* LA. CIV.CODE ANN. art. 2049 (directing the court to interpret a term with a meaning that renders that term effective).

The plaintiffs additionally contend that the canons of construction known as *noscitur a sociis* and *ejusdem generis* support the proposition that the term "flood" is limited to purely natural events.[*] Although

[*] In the context of interpreting earth movement exclusions, some courts have applied these canons of construction to support a distinction between naturally and non-naturally occurring earth movements. *See* COUCH, *supra*, at § 153:66; *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 509 S.E.2d 1, 9 (1998).

we have concluded that the distinction between natural and non-natural events in this context is unworkable and would lead to absurd results, we will nonetheless engage the plaintiffs' arguments about these canons. Under the canon of *noscitur a sociis*, a term is interpreted by considering the meaning of the terms associated with it. *See United States v. Golding*, 332 F.3d 838, 844 (5th Cir.2003) (per curiam); BLACK'S LAW DICTIONARY 1087 (8th ed. 2004) ("A canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it."). Under the canon of *ejusdem generis*, "where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated." *First Am. Title Ins. Co. v. First Trust Nat'l Ass'n (In re Biloxi Casino Belle Inc.)*, 368 F.3d 491, 500 (5th Cir.2004); *see also* BLACK'S LAW DICTIONARY 556 (8th ed.2004). The plaintiffs assert that under these canons, the term "flood" includes only naturally occurring events because the other terms in the water-damage exclusions – e.g., "surface water," "waves," "tidal water," and "overflow of a body of water" – are events that occur naturally.

We disagree that the other terms in the exclusion necessarily refer to natural events. For example, a "surface water" exclusion has been held to bar coverage where the inadequate design of a drainage system caused water to accumulate rather than drain

away, resulting in water damage. *See Front Row Theatre, Inc. v. Am. Mfr.'s Ins. Cos.*, 18 F.3d 1343, 1348 (6th Cir.1994) (applying Ohio law). And the term "waves" has been held to "encompass[ ] both those waves which are motivated by natural forces and those motivated by artificial forces" such as passing motorboats. *See O'Meara v. Am. States Ins. Co.*, 148 Ind.App. 563, 268 N.E.2d 109, 111-12 (1971). Since at least some of the terms immediately surrounding "flood" in the water-damage exclusions also relate to both natural and non-natural events, the canon of *noscitur a socius* does not support the plaintiffs' proposed limitation of the term "flood." And *ejusdem generis* is not at all applicable in interpreting "flood" in the exclusions before us. This canon is used to interpret general terms (e.g., "and the like") following a list of specific terms. *See First Am. Title Ins. Co.*, 368 F.3d at 500. But "flood" is not a general term; it is one of the specific terms listed in the definition of "water damage." Moreover, if we were to employ these canons to justify a distinction between natural and non-natural floods in the context of the facts before us, we would be injecting ambiguity into an otherwise unambiguous term. We decline to do so. *See Tourdot v. Rockford Health Plans, Inc.*, 439 F.3d 351, 354 (7th Cir.2006) (stating that *ejusdem generis* applies only where a term is ambiguous, that it may not be used "both to create and to resolve the ambiguity," and that it "may not be used to defeat the obvious purpose or plain meaning of the text"); *Behenkel & Schultz, Inc. v. Homestead Ins. Co.*, 119 F.3d 548, 551 (7th Cir.1997) ("We cannot use the doctrine [of *noscitur a*

sociis] to create uncertainty in an otherwise unambiguous term. . . . ").

The plaintiffs finally contend that the reasonable expectations of homeowners insurance policyholders would be that damage resulting from man-made floods would be covered. "[A]scertaining how a reasonable insurance policy purchaser would construe the clause at the time the insurance contract was entered" is one way that ambiguity in an exclusion clause may be resolved. *La. Ins. Guar. Ass'n*, 630 So.2d at 764. But "Louisiana law . . . precludes use of the reasonable expectations doctrine to recast policy language when such language is clear and unambiguous." *Coleman v. Sch. Bd. of Richland Parish*, 418 F.3d 511, 522 (5th Cir.2005). As we have explained, the flood exclusions in the policies are unambiguous in the context of the specific facts of this case; thus, we need not resort to ascertaining a reasonable policyholder's expectations. For the sake of thoroughness, however, we will briefly address a few of the parties' arguments.

First, the plaintiffs assert that because their policies are all-risk policies, they have a heightened expectation of coverage and that a reasonable policyholder thus would not expect water damage resulting from third-party negligence to be excluded. Although a few courts have stated that insureds with all-risk policies have "heightened expectations" of coverage, see, e.g., *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 509 S.E.2d 1, 14 (1998), we are not aware of any Louisiana court that has so held. And although

all-risk policies do generally extend to all fortuitous losses, this is true only to the extent that the policy does not expressly exclude the loss from coverage. *See Alton Ochsner Med. Found.*, 219 F.3d at 504. Each policy in this case contains a specific provision expressly excluding damage caused by flood, and none of the exclusions indicates that whether a particular flood is excluded depends on whether its cause is purely natural. Given the generally prevailing use of the term "flood," we believe a reasonable policyholder would expect a massive inundation of water from a breached levee to be excluded, notwithstanding the all-risk nature of the policies.

Second, the plaintiffs assert that because many of the policies contained a "Hurricane Deductible Endorsement," reasonable policyholders would expect those policies to cover damage resulting from a hurricane. Many of the policies contained an endorsement materially similar to the following, from Humphreys's policy with Encompass Indemnity:

> We will pay only that part of the total of the loss for all Property Coverages that exceeds the hurricane deductible stated on the Coverage Summary. The hurricane deductible shown on the Coverage Summary applies to all covered property for direct physical loss or damage caused directly or indirectly by a hurricane as defined below. Such deductible applies regardless of any other cause or event contributing concurrently or in any sequence to the loss. No other deductible provision in the policy applies to direct physical

> loss caused by a hurricane. In no event will the deductible applied for a hurricane loss be less than the property deductible shown on the Coverage Summary.

Hurricane means wind, wind gust, hail, rain, tornado, cyclone or hurricane which results in direct physical loss or damage to property by a storm system that has been declared to be a hurricane by the National Weather Service. . . .

. . . .

All other provisions of this policy apply.

The plaintiffs assert that in light of this language, a reasonable policyholder would have expected the water damage in this case to be covered. Humphreys goes a step further and argues that the hurricane-deductible endorsement in her policy actually expands coverage to extend to any property damage caused by a hurricane.

But the plain language of the hurricane-deductible endorsements indicates that they do nothing more than alter the deductible for damage caused by a hurricane. Nothing in the language of the endorsements purports to extend coverage for floods or to restrict flood exclusions; indeed they do not even include flood or water (other than rain) in the definition of "hurricane." Further, the endorsements state that all other provisions of the policies apply, indicating that the flood exclusions remain in effect. The hurricane-deductible endorsements therefore would

not give a reasonable policyholder the impression that flood resulting from a breached levee would be covered.

Finally, several defendants[26] argue that in light of flood insurance available though the National Flood Insurance Program ("NFIP"), a reasonable policyholder would not expect homeowners policies to cover the flooding in this case. The defendants assert that we may consider the NFIP in interpreting "flood" because custom and industry usage is relevant under article 2053 of the Civil Code. They contend that the NFIP's existence over many years has made it clear to property owners that standard all-risk policies do not cover flood damage, regardless of whether the cause of the flood is natural or non-natural, and that property owners who want flood coverage must purchase it through the NFIP; a reasonable policyholder thus would not expect the inundation of water in this case to be covered under a standard homeowners, renters, or commercial-property insurance policy.

The plaintiffs, in contrast, urge us not to consider the NFIP, contending that it has no bearing on this appeal. And to the extent the NFIP may be relevant, the plaintiffs argue that a reasonable policyholder would expect the NFIP to provide coverage for naturally occurring floods but that floods induced by

[26] Specifically, Standard, Hanover, Great Northern, and the ISO Defendants make this argument.

negligence would be covered under standard all-risk policies.

We do not rely upon the NFIP to decide this appeal. Our decision is based instead upon our determination that the flood exclusions in the policies before us unambiguously preclude the plaintiffs' recovery. But to the extent that the NFIP's definition of "flood" is further evidence of the term's generally prevailing meaning, we note that it is consistent with our interpretation. Standard insurance policies issued under the NFIP define "flood" as follows:

> A general and temporary condition of partial or complete inundation of two or more acres of normally dry land area or of two or more properties (one of which is [the policyholder's] property) from:
>
> a. Overflow of inland or tidal waters,
>
> b. Unusual and rapid accumulation or runoff of surface waters from any source,
>
> c. Mudflow.

44 C.F.R. Pt. 61, App. A(1), App. A(2), App. A(3) (2006); *see also* Federal Emergency Management Agency, FloodSmart.gov: What is a Flood?, http://www.floodsmart. gov/floodsmart/pages/whatflood.jsp (last visited July 25, 2007). The NFIP makes no distinction between inundations of water caused by natural levee ruptures and those caused by man-made ruptures (even if such a distinction were workable). The canals' overflowing into the City of New Orleans due to the

levee ruptures was certainly an overflow of inland waters as used in the NFIP's definition, and it may also have been an unusual and rapid runoff of surface waters.

In sum, we conclude that the flood exclusions in the plaintiffs' policies are unambiguous in the context of the facts of this case. In the midst of a hurricane, three canals running through the City of New Orleans overflowed their normal boundaries. The flood-control measures, i.e., levees, that man had put in place to prevent the canals' floodwaters from reaching the city failed. The result was an enormous and devastating inundation of water into the city, damaging the plaintiffs' property. This event was a "flood" within that term's generally prevailing meaning as used in common parlance, and our interpretation of the exclusions ends there. The flood is unambiguously excluded from coverage under the plaintiffs' all-risk policies, and the district court's conclusion to the contrary was erroneous.[27]

C. Efficient Proximate Cause and Anti-Concurrent-Causation Clauses

Lastly we turn to the doctrine of efficient proximate cause. Under this doctrine, as it is applied in

---

[27] Because we reach this conclusion, we need not address the issue raised in the cross-appeals of the impact of the "lead-in" language in the State Farm policies.

many jurisdictions, where a loss is caused by a combination of a covered risk and an excluded risk, the loss is covered if the covered risk was the efficient proximate cause of the loss.[28] *See, e.g., Chadwick v. Fire Ins. Exch.,* 17 Cal.App.4th 1112, 21 Cal.Rptr.2d 871, 873 (1993); *Kish v. Ins. Co. of N. Am.,* 125 Wash.2d 164, 883 P.2d 308, 311 (1994); *see also* COUCH, *supra,* at §§ 101:43-:45,:53-:55. The efficient proximate cause of the loss is the dominant, fundamental cause or the cause that set the chain of events in motion. *See* COUCH, *supra,* at § 101:45.

Many of the insurance policies at issue in this appeal excluded "loss caused directly or indirectly by" flood "regardless of any other cause or event contributing concurrently or in any sequence to the loss."

---

[28] To our knowledge, the Louisiana Supreme Court has not addressed the applicability of the efficient-proximate-cause doctrine in the context of an all-risk policy. But it has concluded in the context of interpreting a windstorm insurance policy (which provided coverage only for loss caused by windstorm) that "if a windstorm is the dominant and efficient cause of the loss, the insured may recover notwithstanding that another cause or causes contributed to the damage suffered." *Lorio v. Aetna Ins. Co.,* 255 La. 721, 232 So.2d 490, 493 (1970); *see also Roach-Strayhan-Holland Post No. 20, Am. Legion Club, Inc. v. Continental Ins. Co. of N.Y.,* 237 La. 973, 112 So.2d 680, 683 (1959) ("[I]t is sufficient, in order to recover upon a windstorm insurance policy not otherwise limited or defined, that the wind was the proximate or efficient cause of the loss or damage, notwithstanding other factors contributing thereto."). We express no opinion on the extent to which Louisiana follows the efficient-proximate-cause rule in the context of all-risk policies because we conclude that the rule is inapplicable to this case.

This language, which the district court referred to as an anti-concurrent-causation clause, has been recognized as demonstrating an insurer's intent to contract around the operation of the efficient-proximate-cause rule. *See, e.g., TNT Speed & Sport Ctr., Inc. v. Am. States Ins. Co.,* 114 F.3d 731, 732-33 (8th Cir.1997).

The district court considered the anti-concurrent-causation clauses in this case and concluded that they are inapplicable here because there were not two separate causes of the plaintiffs' damage. The court remarked that this case does not present a combination of forces that caused damage and that it therefore is not analogous to cases where Hurricane Katrina may have damaged property through both wind and water. *Cf. Tuepker v. State Farm Fire & Cas. Co.,* No. 1:05-CV-599, 2006 WL 1442489, 2006 U.S. Dist. LEXIS 34710 (S.D.Miss. May 24, 2006) (unpublished opinion) (Hurricane Katrina case involving alleged damage from wind, rain, and storm surge), *appeal docketed,* Nos. 06-61075 & 06-61076 (5th Cir.). Instead, the court stated that "in this case the 'cause' conflates to the flood," meaning that the alleged negligent design, construction, or maintenance of the levees and the resulting flood were not separate causes of the plaintiffs' losses. Consequently, the court concluded that the anti-concurrent-causation clauses needed not be addressed at that time but stated that they may need to be addressed at later stages in the litigation.

On appeal, several insurers rely in part on the language in their anti-concurrent-causation clauses

to demonstrate that floods are excluded regardless of the cause. The *Chehardy* plaintiffs respond that "the District Court correctly determined that the anti-concurrent causation clauses were inapplicable," contending that the cause of their damage ("man-made inundation of water or inundation resulting from third-party negligent acts") was a covered peril.[29] Xavier responds that the district court "correctly noted that [the anti-concurrent-causation clause] is inapplicable because there is no separate or other cause of damage."

We agree with the district court's determination that we need not address whether insurers may contract around the efficient-proximate-cause rule under Louisiana law, nor need we address the operation of the efficient-proximate-cause rule itself in this case. The efficient-proximate-cause doctrine applies only where two or more distinct actions, events, or forces combined to create the loss. *See Pieper v. Commercial Underwriters Ins. Co.*, 59 Cal.App.4th 1008, 69 Cal.Rptr.2d 551, 557 (1997) ("For the efficient proximate cause theory to apply, . . . there must be two separate or distinct perils. . . ."); *Kish*, 883 P.2d at 311 ("The efficient proximate cause rule applies only where two or more independent forces operate to cause the loss."). But here, on these pleadings, there are not two independent causes of the plaintiffs' damages at play; the only force that damaged the

[29] The *Vanderbrook* plaintiffs and Humphreys adopted the *Chehardy* plaintiffs' arguments.

plaintiffs' properties was flood. To the extent that negligent design, construction, or maintenance of the levees contributed to the plaintiffs' losses, it was only one factor in bringing about the flood; the peril of negligence did not act, apart from flood, to bring about damage to the insureds' properties. Consequently, as the plaintiffs argue and as the district court held, the efficient-proximate-cause doctrine is inapplicable. *See Chadwick,* 17 Cal.App.4th at 1117, 21 Cal.Rptr.2d 871 ("When, however, the evidence shows the loss was in fact occasioned by only a single cause, albeit one susceptible to various characterizations, the efficient proximate cause analysis has no application."); *see also Cornhusker Cas. Co. v. Farmers Mut. Ins. Co.,* 268 Neb. 168, 680 N.W.2d 595, 601-02 (2004); *Kish,* 883 P.2d at 311.

Moreover, to the extent that the plaintiffs do attempt to recharacterize the cause of their losses by focusing on negligence as the cause rather than water damage, their argument fails. "An insured may not avoid a contractual exclusion merely by affixing an additional label or separate characterization to the act or event causing the loss." *Kish,* 883 P.2d at 311; *Chadwick,* 21 Cal.Rptr.2d at 874. "If every possible characterization of an action or event were counted an additional peril, the exclusions in all-risk insurance contracts would be largely meaningless." *Chadwick,* 21 Cal.Rptr.2d at 874. Thus, in *Pieper v. Commercial Underwriters Insurance Co.,* where a policy covered loss caused by arson but excluded loss caused by brush fire, a brush fire caused by arson

was excluded. 69 Cal.Rptr.2d at 557-58. The *Pieper* court determined that the cause of the brush fire was irrelevant; the plaintiffs' property was damaged by one cause alone, brush fire, and thus, the efficient-proximate-cause rule was inapplicable. *Id.* And in *Kish v. Insurance Co. of North America,* where a policy covered loss caused by rain but excluded loss caused by flood, the court held that the insured could not avoid the operation of the flood exclusion by merely recharacterizing the flood as rain. 883 P.2d at 311-13. The court held that there was one cause of the plaintiffs' loss-rain-induced flood – which was excluded, and concluded that the efficient-proximate-cause rule was inapplicable. *Id.* We similarly reject any attempt on the plaintiffs' part to avoid the operation of the flood exclusion by recharacterizing the flood as negligence; the sole cause of the losses for which they seek coverage in this litigation, flood, was excluded from coverage regardless of what factors contributed to its development.

In sum, we need not address the applicability of anti-concurrent-causation clauses or the efficient-proximate-cause rule because, as pleaded, there was not more than one separate cause of the plaintiffs' losses. As the district court recognized, there are other cases arising in the context of Hurricane Katrina where these issues may come into play, but this is not the case for their resolution.

IV. CONCLUSION

With respect to the *Vanderbrook* action, the district court's grant of State Farm's motion for judgment on the pleadings is AFFIRMED. The denial of the motions for judgment on the pleadings filed by Hanover and Standard Fire is VACATED and REMANDED.

With respect to the *Xavier* action, the motion to certify questions to the Louisiana Supreme Court is DENIED. The district court's grant of partial summary judgment in favor of Xavier is VACATED and REMANDED.

With respect to the *Chehardy* action, the motion to certify questions to the Louisiana Supreme Court is DENIED. The district court's grant in part of State Farm's motion to dismiss is AFFIRMED. And the denial of the motions to dismiss filed by Lafayette, Liberty Mutual, American, Auto Club, Standard Fire, Lexington, Aegis, Hanover, Allstate, Louisiana Citizens, Encompass Insurance, and Great Northern pertaining to the claims for declaratory judgment and breach of contract is VACATED and REMANDED.

With respect to the *Humphreys* action, the district court's denial of Humphreys's partial-summary-judgment motion on the question of coverage under the policy's hurricane-deductible endorsement is AFFIRMED. The grant of partial summary judgment in Humphreys's favor on the question of the interpretation of the policy's flood exclusion is VACATED and REMANDED.

Motions DENIED; AFFIRMED in part, VACATED in part, and REMANDED for further proceedings consistent with this opinion. The appellees shall bear the cost of this appeal.

466 F.Supp.2d 729*

United States District Court, E.D. Louisiana.
In re KATRINA CANAL BREACHES CONSOLIDATED LITIGATION.
Pertains to Insurance Vanderbrook, C.A. No. 05-6323, Xavier University, C.A. No. 06-516, Chehardy, C.A. No. 06-1672, 06-1673, and 06-1674
and Kelly A. Humphreys
v.
Encompass Insurance Company, et al.
Civil Action Nos. 05-4182, 06-0169.

Nov. 27, 2006.

Daniel E. Becnel, Jr., Law Offices of Daniel E. Becnel, Jr., Reserve, LA, Jon Wesley Wise, Fowler Rodriguez, Gerald Edward Meunier, Gainsburgh, Benjamin, David, Meunier & Warshauer, Stephen Skelly Kreller, Stephen S. Kreller, Aplc, Justin I. Woods, Murray Law Firm, Kara M. Hadican, Gainsburgh, Benjamin, David, Meunier & Warshauer, Alfred Ambrose Sarrat, Jr., Jacobs & Sarrat, Robert G. Harvey, Sr., Law Office of Robert G. Harvey, Sr., Aplc, Hugh Palmer Lambert, Evelyn Alexis Bevis, Linda Jane Nelson, Lambert & Nelson, Tamara Kluger Jacobson, Law Office of Tamara Kluger Jacobson, Thomas J. Corrington, The Corrington Law Firm, Randall A. Smith, Kirk Reasonover, Laura Hawkins Davis, Owen B. St. Amant, Smith & Fawer,

* Any typographical and/or incorrect punctuation found in this document were intentionally left to show accurately how the original document appeared.

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James M. Garner, Darnell Bludworth, Kevin M. McGlone, Timothy B. Francis, Law Offices of Sher Garner Cahill Richter Klein & Hilbert, New Orleans, LA, for Xavier University.

ORDER

DUVAL, District Judge.

On September 19, 2006, *Berthelot, et al. v. Boh Bros. Construction, et al.*, C.A. No. 05-4182 was filed in the Eastern District of Louisiana. This case began the stream of complaints that have been filed as a result of damages arising out of all levee breaches which occurred in the aftermath of Hurricane Katrina.

Berthelot was transferred to the undersigned on February 23, 2006. (Doc. 47). It was subsequently determined by the *en banc* court of the Eastern District of Louisiana that in order to avoid conflicting decisions among the various sections of the Court, the proper approach would be to consolidate all such

filings for purposes of pretrial discovery and motion practice. As such, what is now captioned "*In re: Katrina Canal Breaches Consolidated Litigation,*" C.A. No. 05-4182, has become the umbrella for all cases which concern damages caused by flooding as a result of breaches or overtopping in the areas of the 17th Street Canal, the London Avenue Canal, the Industrial Canal, and the Mississippi Gulf River Outlet ("MRGO").

The following Orders and Reasons[1] are being entered in four individual cases which are part of the umbrella and all of which have as their centerpiece the issue of insurance coverage. Theses cases are:

Vanderbrook, et al. v. State Farm Fire & Cas. Co., et al. C.A. No. 05-6323;

Xavier University of Louisiana v. Travelers Property Ca. Co. of America, C.A. No. 06-516;

Chehardy, et al. v. State Farm, et al., C.A. No. 06-1672, 06-1673, and 06-1674; and

Humphreys v. Encompass Ins. Co., C.A. No. 06-169.[2]

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[1] The document numbers referred to herein are those as entered in the Consolidated Matter unless otherwise noted; once a case is consolidated in the umbrella, any document filed is entered sequentially, regardless of the case to which it pertains.

[2] *Humphreys* was initially consolidated but at the request of the litigants it was terminated from the umbrella; however, in light of the inter-related nature of this case, the Court will include this case in this consolidated opinion.

Oral argument was conducted with respect to *Vanderbrook* on August 25, 2006, and with respect to *Xavier, Chehardy and Humphreys* on October 27, 2006. Based on the pleadings, memoranda, exhibits, arguments and the relevant law, the Court is prepared to rule on all the motions pending in all four cases.

IT IS ORDERED that this document shall be entered onto the docket of the *In re Katrina Canal Breaches Consolidated Litigation,* C.A. No. 05-4182 referencing all three of the cases noted above and *Humphreys* separately. The Court will begin with the *Vanderbrook* matter.

THIS ORDER PERTAINS SPECIFICALLY TO:

Vanderbrook, et al. v. State Farm Fire & Cas. Co., et al. C.A. No. 05-6323;

ORDER AND REASONS

Before the Court are the following motions filed in this matter:

Doc. No. 568 Motion for Judgment on the Pleadings filed by Hanover Ins. Co. ("Hanover") insurer of plaintiff James Capella and Madeline Grenier;[3]

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[3] At oral argument on these motions, Hanover orally moved to include in its motion the claims of Madeline Grenier who had been misidentified as Sophia Granier as the insured. This

(Continued on following page)

Doc. No. 569 Motion for Judgment on the Pleadings filed by Standard Fire Ins. Co. ("Standard") insurer of plaintiffs Peter Anthony Ascani, III, Gregory R. Jackson, and Monica Reyes;

Doc. No. 570 Motion for Judgment on the Pleadings filed by State Farm Fire & Cas. Co. ("State Farm") insurer of Mary Jane Silva and Robert G. Harvey;

Doc. No. 572 Motion to Dismiss Party filed by Hartford Ins. Co. of the Midwest ("Hartford") insurer of Jack Capella as the Executor of the Succession of Lillian Capella;

Doc. No. 598 Motion for Judgment on the Pleadings filed by Unitrim Preferred Ins. Co. ("Unitrim") insurer of Richard Vanderbrook.

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motion was orally granted. Thus, the docket sheet as to this motion does not include her as the subject of the motion; however, the docket sheet should be so amended to reflect that the plaintiff Sophia Granier is actually Madeline Grenier and **IT IS SO ORDERED**. At the time of the hearing, the relevant policy of insurance was introduced and filed into the record.

Additionally, certain of the Defendants are improperly named. The Standard Fire Insurance Company ("Standard Fire") is improperly named as Travelers Insurance Company and St. Paul Travelers Insurance Company. Hartford Insurance Company of the Midwest ("Hartford") is improperly named as Hartford Insurance Company. Unitrin Preferred Insurance Company ("Unitrin") is improperly named as Kemper Insurance Company.

These motions were brought in response to the class action suit brought by the "Vanderbrook" plaintiffs.

The instant petition was initially filed in Civil District Court for the Parish of Orleans on October 14, 2005. Plaintiffs filed suit seeking coverage for damages caused by the collapse of the 17th St. Canal floodwall and the ensuing water damage as well as claims against the Board of Commissioners for the Orleans Levee District ("OLD") for its alleged negligence. Defendants removed the case to this Court on December 2, 2005. On June 1, 2006, the Court severed the claims brought against OLD from those filed against the insurers and finding no basis for jurisdiction over OLD, remanded those claims to Civil District Court. The Court retained diversity jurisdiction over the remaining insurers.

Five different policies of insurance are involved in this case – all Homeowners/All Risk policies. Oral argument was conducted on August 25, 2006, and supplemental briefing ordered thereafter. Having reviewed the complaint, memoranda, exhibits, briefing, and the relevant law, the Court is now prepared to deliver its opinion.

It cannot be gainsaid that in approaching these motions, which are the first in a daunting line of litigation concerning insurance coverage for the losses caused by the canal breaches in New Orleans, the potential impact of such a decision on individuals as well as the insurance industry might be considered

overwhelming. However, the Court believes that it is its duty to approach its analysis in a straightforward, judicious manner – that is analyzing the contractual disputes between an individual policy holder and the relevant insurer, sitting as an *Erie* court, using the civilian approach of a Louisiana court, applying the Louisiana Civil Code and seeking guidance from the jurisprudence of the state.

I. Civilian Approach as an *Erie* Court

This Court will apply Louisiana law in an attempt to rule as a Louisiana court would if presented with the same issues. *Musser Davis Land Co. v. Union Pacific Resources,* 201 F.3d 561, 565 (5th Cir.2000), *citing Erie R. Co. v. Tompkins,* 304 U.S. 64, 79-80, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Mozeke v. Int'l Paper Co.,* 856 F.2d 722, 724 (5th Cir.1988). As stated in *Musser*:

> To determine a state law question, we first look to decisions of the Louisiana Supreme Court. *See Transcontinental Gas v. Transportation Ins. Co.,* 953 F.2d 985, 988 (5th Cir.1992). If the Louisiana Supreme Court has not spoken on the issue, it is our duty to determine as best we can what that court would decide. *See id.*; *Hulin v. Fibreboard Corp.,* 178 F.3d 316, 318-19 (5th Cir.1999).

Under Louisiana's Civil Law tradition, courts look first and foremost to statutory law. The Louisiana Civil Code instructs that "[sources of law are legislation and custom.]" and that "[l]legislation is a solemn

expression of legislative will." "[T]he primary basis of law for a civilian is legislation, and not (as in the common law) a great body of tradition in the form of prior decisions of the courts." The concept of *stare decisis* is foreign to the Civil Law, including Louisiana. Therefore, in cases such as this we are guided by decisions rendered by the Louisiana appellate courts, particularly when numerous decisions are in accord on a given issue – the so-called *jurisprudence constant* – but we are not strictly bound by them.

Transcontinental Gas Pipe Line Corp. v. Transportation Ins. Co., 953 F.2d 985, 988 (5th Cir.1992) (footnotes omitted). Thus, the Louisiana Civil Code provides the primary source and framework by which this Court must review the these contracts. With this in mind, the Court will first examine the allegations made by the plaintiffs.

II. The Petition and Issue Presented

Plaintiffs each own a home in New Orleans which is insured by one of the defendants and which suffered substantial water damage at the time of Hurricane Katrina. (Petition, ¶ 7.) They allege that "[s]ometime between 10:00 and 11:00 a.m. on August 29, 2005, before the full force of [Hurricane Katrina] reached the City of New Orleans, a small section of the concrete outfall canal wall known as the 17th Street Canal, suddenly broke, causing water to enter the streets of the City of New Orleans and homes of Petitioners," which damaged Plaintiffs' homes. (*Id.*,

¶ 3.) Plaintiffs contend that "said water damage inflicted on the Petitioners' homes and property was *not* the result of flood, surface water, waves, title [sic] water, tsunami, seiche, overflow of a body of water, seepage under or over the outfall canal wall or spray from any of the above but was water intrusion, caused simply from a broken levee wall." (*Id.*, ¶ 4 (emphasis added).) Plaintiffs claim that defendants improperly failed to pay for the water damage to their homes because it is not an excluded loss. (*Id.*, ¶ 10.) Plaintiffs also contend that the water damage exclusions in the policies are unconscionable and void. (*Id.*, ¶ 11.)

Plaintiffs further allege, separately, that the Levee Board "breached their duty to Petitioners by failing to correct the break [in the canal wall] or warn others including Petitioners of the impending water intrusion. . . ." (*Id.*, ¶ 6.) As noted, these allegations have been severed and remanded to state court.

Plaintiffs contend that because Louisiana employs the "efficient proximate cause doctrine" with respect to coverage and because the third-party negligence of Orleans Levee District is the efficient, proximate cause of the subsequent flooding of plaintiffs' homes, their Homeowners Policies should provide coverage. The defendants maintain that under the clear, unambiguous terms of the policies at issue, they are entitled to judgment as a matter of law.

III. Standard for Judgment on the Pleadings

When a defendant attacks the complaint because it fails to state a legally cognizable claim, Rule 12(b)(6) provides the appropriate challenge. The test for determining the sufficiency of a complaint under Rule 12(b)(6) is that "'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id. citing Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). The Fifth Circuit explained:

> Subsumed within the rigorous standard of the *Conley* test is the requirement that the plaintiff's complaint be stated with enough clarity to enable a court or an opposing party to determine whether a claim is sufficiently alleged. *Elliott v. Foufas,* 867 F.2d 877, 880 (5th Cir.1989). Further, "the plaintiff's complaint is to be construed in a light most favorable to plaintiff, and the allegations contained therein are to be taken as true." *Oppenheimer v. Prudential Securities, Inc.* 94 F.3d 189, 194 (5th Cir.1996). This is consistent with the well-established policy that the plaintiff be given every opportunity to state a claim. *Hitt,* 561 F.2d at 608. In other words, a motion to dismiss an action for failure to state a claim "admits the facts alleged in the complaint, but challenges plaintiff's rights to relief based upon those facts." *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.,* 975 F.2d 1134, 1137 (5th Cir.1992). Finally, when

> considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the district court must examine the complaint to determine whether the allegations provide relief on any possible theory. *Cinel v. Connick,* 15 F.3d 1338, 1341 (5th Cir.1994).

Id. at 161-62, 78 S.Ct. 99. Bearing this standard in mind, the court will examine the civilian rules of construction to aid it in its determination of the viability of defendants' motions.

IV. Legal Concepts for Contract Interpretation

A. Insurance Policy is a Contract and Rules of Construction

"An insurance policy is a conventional obligation that constitutes the law between the insured and insurer, and the agreement governs the nature of their relationship." La. Civ.Code art.1983; *Edwards v. Daugherty,* 883 So.2d 932, 940 (La.2004); *Peterson v. Schimek,* 729 So.2d 1024, 1028 (La.1999). As such, the general rules of contract interpretation as set forth in the Louisiana Civil Code guide the Court in interpreting the subject insurance policies. *Peterson,* 729 So.2d at 1028. "The judiciary's role in interpreting insurance contracts is to ascertain the common intent of the parties to the contract. *See* La. Civ.Code art.2045; *Carbon* [*v. Allstate Ins. Co.,* 97-3085, p. 4 (La. 10/20/98), 719 So.2d 437, 439]; *Louisiana Ins.* [*Guar. Ass'n v. Interstate Fire & Cas. Co.* 03-0911, p. 5

(La.1/14/94)], 630 So.2d 759, 763." *Cadwallader v. Allstate Ins. Co.*, 848 So.2d 577 (La.2003).

In *Cadwallader*, the Supreme Court of the State of Louisiana set forth succinctly the most important guiding principles:

> Words and phrases used in an insurance policy are to be construed using their plain, ordinary and generally prevailing meaning, unless the words have acquired a technical meaning. *See* La. Civ Code art.2047; *Peterson v. Schimek*, 98-1712, p. 5 (La.3/2/99), 729 So.2d 1024, 1028-29; *Carbon*, 719 So.2d at 440-441; *Reynolds*, 634 So.2d at 1183. An insurance contract, however, should not be interpreted in an unreasonable or strained manner under the guise of contractual interpretation to enlarge or to restrict its provisions beyond what is reasonably contemplated by unambiguous terms or achieve an absurd conclusion. *Carrier v. Reliance Ins. Co.*, 99-2573, p. 11 (La.4/11/00), 759 So.2d 37, 43; *Peterson*, 729 So.2d at 1029. The rules of construction do not authorize a perversion of the words or the exercise of inventive powers to create an ambiguity where none exists or the making of a new contract when the terms express with sufficient clearness the parties' intent. *Succession of Fannaly v. Lafayette Ins. Co.*, 01-1355, p. 4 (La.1/15/02), 805 So.2d 1134, 1138; *Peterson*, 729 So.2d at 1029.
>
> . . .

> If the policy wording at issue is clear and unambiguously expresses the parties' intent, the insurance contract must be enforced as written. *Fannaly,* 805 So.2d at 1137; *Louisiana Ins.,* 630 So.2d at 764. Courts lack the authority to alter the terms of insurance contracts under the guise of contractual interpretation when the policy's provisions are couched in unambiguous terms. *Peterson,* 729 So.2d at 1029; *Louisiana Ins.,* 630 So.2d at 764. The determination of whether a contract is clear or ambiguous is a question of law. *Louisiana Ins.,* 630 So.2d at 764.

Cadwallader, 848 So.2d at 580 (coverage provided by UM policy for resident relative in household did not include foster children). In addition, an insurance contract "is construed as a whole and each provision in the policy must be interpreted in light of the other provisions so that each is given meaning. One portion of the policy should not be construed separately at the expense of disregarding other provisions." La. Civ.Code art. 2050. *Peterson,* 729 So.2d at 1029.

B. All-Risks Liability Insurance: Coverage, Exclusions and Ambiguities

A Homeowners Policy is considered a type of "all-risks" insurance. "All-risks insurance is a special type of insurance extending to risks not usually contemplated, and generally allows recovery for all fortuitous losses, unless the policy contains a specific exclusion expressly excluding the loss from coverage." Jane Massey Draper, "Coverage Under All-Risk

Insurance", 30 A.L.R.5th 170. The United States Court of Appeals for the Fifth Circuit acknowledged this concept stating, "[a] policy of insurance insuring against 'all risks' creates a special type of coverage that extends to risks not usually covered under other insurance; recovery under an all-risk policy will be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage." *Alton Ochsner Medical Foundation v. Allendale Mut. Ins.*, 219 F.3d 501, 504 (5th Cir.2000), *citing U.S. Indus., Inc. v. Aetna Cas. & Sur. Co.*, 690 F.2d 459, 461 (5th Cir.1982) (construing Louisiana law and citing *Dow Chem. Co. v. Royal Indem. Co.*, 635 F.2d 379, 387 (5th Cir.1981) (construing Texas law)).

Thus, in the context of the instant motions, under Louisiana law, unless there is a specific exclusion for the type of water damage that an insured has incurred, coverage is presumed under these policies. The focus of a court's inquiry then is on the relevant exclusions to coverage. "When determining whether or not a policy affords coverage for an incident, it is the burden of the insured to prove the incident falls within the policy's terms. . . . On the other hand, the insurer bears the burden of proving the applicability of an exclusionary clause within a policy." *Doerr v. Mobil Oil Corp.*, 774 So.2d 119, 124 (La.2000).

With respect to the proper approach concerning the interpretation of an exclusion, they are generally strictly construed. *Bezue v. Hartford Accident and*

Indem. Co., 224 So.2d 76, 77 (La.App. 1st Cir.1969). *Cadwallader* further amplifies this concept:

> Ambiguous policy provisions are generally construed against the insurer and in favor of coverage. La. Civ.Code art.2056; *Carrier,* 759 So.2d at 43; *Louisiana Ins.*, 630 So.2d at 764. Under this rule of strict construction, **equivocal provisions seeking to narrow an insurer's obligation are strictly construed against the insurer.** *Carrier,* 759 So.2d at 43.

Cadwallader, 848 So.2d at 580 (emphasis added). This rule of interpretation is based on the fact that these provisions are prepared by the insurer, and the insured had no voice in the preparation. *Louisiana Ins.*, 630 So.2d at 764. This type of contract is commonly referred to as a contract of adhesion. Article 2056 states, "In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text. A contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party." La. Civ.Code art.2056; *see Louisiana Ins. Guar. Assoc.*, 630 So.2d at 764 *citing* 15 *Civil Law Treatise, Insurance Law and Practice* § 4 (1986) and W. Freedman, 2 *Richards on the Law of Insurance* § 11:2[f] (6th Ed.1990) ("*Richards*"). "That strict construction principle applies only if the ambiguous policy provision is susceptible to two or more *reasonable* interpretations; for the rule of strict construction to apply, the insurance policy must be not only

susceptible to two or more interpretations, but each of the alternative interpretations must be reasonable." *Cadwallader,* 848 So.2d at 580 *citing Carrier,* 759 So.2d at 43-44. (emphasis in original) and *Louisiana Ins. Guar. Assoc.,* 630 So.2d at 770.

The Supreme Court of Louisiana gave further instruction with respect to the interpretation of an ambiguity in *Louisiana Ins. Guar. Assoc.* stating:

> "Ambiguity will also be resolved by ascertaining how a reasonable insurance policy purchaser would construe the clause at the time the insurance contract was entered." *Breland v. Schilling,* 550 So.2d 609, 610-11 (La.1989). The court should construe the policy "to fulfill the reasonable expectations of the parties in the light of the customs and usages of the industry." *Trinity Industries,* 916 F.2d at 269 (5th Cir.1990) (citing *Benton,* 379 So.2d at 231 and LSA-C.C. Arts.2045, 2050, 2053 and 2054). In insurance parlance, this is labeled the reasonable expectations doctrine. *Richards, supra* at § 11:2[g].

Louisiana Ins. Guar. Assoc., 630 So.2d at 764. The Louisiana Supreme Court then noted in a footnote:

> "The reasonable expectations doctrine can be capsulized as follows: courts will protect the [insured's] reasonable expectations . . . regarding the coverage afforded by insurance contracts even though a careful examination of the policy provisions indicates that such expectations are contrary to the expressed

> intention of the insurer." R. Keeton and A. Widiss, *Insurance Law* § 6.13 (1988).

Id. at n. 19. Thus, if after applying the other general rules of construction, an ambiguity remains, the ambiguous contractual provision is to be construed against the insurer who furnished the policy's text and in favor of the insured finding coverage. La. Civ.Code art. 2056. *Peterson,* 729 So.2d at 1029. "It is the reasonable interpretation of an insured that governs the legal effect of language in an insurance contract, and not whether the language chosen by an insurer may constitute a legal term of art in another context." *Lee v. Unum Life Ins. Co. of America,* 900 So.2d 1021, 1029 (La.App. 4th Cir.2005).

C. Exclusions and Canons of Construction

The Louisiana Supreme Court in interpreting an exclusion to coverage in the context of a company's public liability insurance stated:

> The exclusion clause must necessarily be examined and interpreted in the light of its own design and intent, as well as in view of the objects and purposes of the policy. Once coverage has been extended, as it is quite clearly the purpose of the policy to do and as has been done here, it should be withdrawn only when exclusion is established with certainty. And because comprehensive exclusion is violative of the purpose and intent of policy coverage, exclusion must necessarily be

> specific and not general. It is specific, as distinguished from comprehensive, when it particularly identifies the insured or insureds intended to be excluded. The exclusion clause, as its name implies, sets forth the traits, characteristics and circumstances that mark an insured for exclusion. And the insured or insureds to be excluded must bear the marks and traits, or conform with the circumstances, described and particularized in the exclusion clause as the basis for exclusion.'

Pullen v. Employers' Liability Assur. Corp., 230 La. 867, 89 So.2d 373, 377 (La.1956).

Indeed, in *Anderson v. Indiana Lumbermens Mut. Ins. Co.*, 127 So.2d 304 (La.App. 2nd Cir.1961), a Louisiana appellate court dealt with a claim made on homeowner policy where "collapse" was a covered peril and there was an exclusion which provided that the insurer would not be liable "for loss caused directly or indirectly by earthquake, **or other earth movements** except landslides." *Id.* at 304 (emphasis added). In the home in question, a crack had appeared in the wall of the house and since that time, the crack had become larger, extending into the ceiling of the living room and cracks had appeared in the walls, at every window and door in the house. The door frames were out of square and the foundation was broken, cracked, fallen and uneven. It was alleged in that case that the cause of damage to the home was (1) the expansion and contraction of the soil which had caused (2) the cracking, breaking and

falling of the concrete slab (3) combined with the falling cracking, breaking and unequal settlement of the building (4) thus impairing the basic structural integrity of the building. The insurer maintained that the damage to the house did not constitute a "collapse" and that even if it did, it was excluded as it was caused by "other earth movements."

The appellate court noted that there was no precedent for an interpretation of "collapse" in Louisiana and noted that there were four cases rendered outside of Louisiana where the evidence did not indicate the structure had completely fallen down or caved in – two finding coverage and two denying coverage based on this exclusion.

The court, after discussing the guidance provided by the Civil Code in determining the construction of the word "collapse", noted:

> LSA-Civil Code, art.1955 providing that 'all clauses of agreements are interpreted the one by the other, giving to each the sense that results from the entire act' appears to be a statement of the 'ejusdem generis' rule of construction, concerning which Black's Law Dictionary states:
>
> > 'In the construction of laws, wills, and other instruments, the 'ejusdem generis rule' is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed

> in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. Black, Interp. of Laws, 141; *Goldsmith v. U.S.*, 42 F.2d 133, 137; *Aleksich v. Industrial Accident Fund*, 116 Mont. 127, 151 P.2d 1016, 1021. The rule, however, does not necessarily require that the general provision be limited in its scope to the identical things specifically named. Nor does it apply when the context manifests a contrary intention.
>
> 'The maxim 'ejusdem generis', is only an illustration of the broader maxim, 'noscitur a sociis'. *State v. Western Union Telegraph Co.*, 196 Ala. 570, 72 So. 99, 100.'

And, in defining the phrase, 'noscitur a sociis', as used in the aforesaid definition the following explanation and definition are given:

> 'It is known from its associates, 1 Vent. 225. The meaning of a word is or may be known from the accompanying words. 3 Term R. 87; Broom, Max. 588. *Morecock v. Hood*, 202 N.C. 321, 162 S.E. 730, 731; *Louis Pizitz Dry Goods Co. v. Fidelity & Deposit Co. of Maryland*, 223 Ala. 385, 136 So. 800, 801.
>
> 'The doctrine means that general and specific words are associated with and take color from each other, restricting general words to

> sense analogous to less general. *Dunham v. State,* 140 Fla. 754, 192 So. 324, 325, 326.'

Anderson, 127 So.2d at 306-07; *but see, Nida v. State Farm Fire & Cas. Co.,* 454 So.2d 328 (La.App. 3rd Cir.1984) (insurance definition of "collapse" in policy at issue revised to deny coverage for losses against settling). The *Anderson* court eventually found that the insurance at issue therein provided coverage finding that "collapse" would not be given an "abstract, narrow construction." Citing to *Jenkins v. United States Fire Ins. Co.,* 185 Kan. 665, 347 P.2d 417 (Kan.1959), the court noted that construing on the basis of intention, it would be understood that if the settling, falling, cracking bulging or breaking of the insured building so materially impaired the basic structure, that it would be considered a "collapse." Thus, the Court in interpreting the **risk insured** employed the **expansive** definition.

The court then found that the **exclusion** was to be **narrowly construed** relying on *Pullen.* It found that "other earth movements" is entirely "too general to have application to any degree of certainty" to the causation of the "collapse" of the subject building as the cause of damage would embrace "the same general kind, class or nature of peril as its companion words 'earthquake' and 'landslide.'" *Anderson,* 127 So.2d at 308-09. As such, the concept of the "specific controls the general" was used to find the exclusion limited a more violent earth movement – not just the natural expansion and contraction of the soil that had allegedly caused the damage for which coverage was

sought. *See also, Smith v. Burton,* 928 So.2d 74, 79 (La.App. 1st Cir.2005); *Baton Rouge Oil and Chem. Workers Union v. ExxonMobil Corp.,* 289 F.3d 373, 377 (5th Cir.2002); *Sommers v. State Farm Fire and Cas. Co.,* 764 So.2d 87, 91 (La.App. 4th Cir.2000) (where general terms precede specific terms, principle is the same: general terms should be construed to encompass things similar or analogous to those in the specific terms). With these precepts in mind the Court will now turn to the specific water damage exclusions at issued before the Court.

V. Insuring Language and Exclusions of the Policies at Issue

a. ISO Policies

The "ISO policies"[4] issued by Standard Fire, Hartford, Hanover and Unitrin, all contain identical language. As to the coverage provided, each policy states:

> COVERAGE A – DWELLING and
> COVERAGE BOTHER STRUCTURES:
>
> We insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property.

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[4] "ISO" is an acronym for "Insurance Service Office, Inc." which provides products and services help to the insurance industry to measure, manage and reduce risk. It provides standardized insurance policy language such as the policies noted herein. *See,* ISO Homepage at www. iso. com.

(Standard Fire Policies, App. at INS 94 and INS 134; Hartford Policy, App. at INS 53; Hanover Policy, App. at INS 7; Unitrin Policy, App. at INS 169.)[5] Following the coverage provision, this exclusion appears:

> (1) We do not insure for loss **caused directly or indirectly by any of the following.** Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.[6]
>
> . . .
>
> **(c) Water Damage,** meaning:
>
> Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

(Standard Fire Policies, App. at INS 96 and INS 136; Hartford Policy, App. at INS 56; Hanover Policy, App.

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[5] These citations refer to the appendix filed in conjunction with the Motion for Judgment on the Pleadings filed by Hanover Ins. Co. (Doc. No. 568) that was used as a joint exhibit containing all of the insurance policies at issue herein.

[6] This provision is generally referred to as an "anti-concurrent cause clause." Its genesis was the result of court decisions utilizing the "concurrent causation doctrine". Under this doctrine, the insurer is obligated to pay for damages resulting from a combination of covered and excluded perils if the efficient proximate cause is a covered peril. To counteract these decisions, insurers began employing the anti-concurrent cause clause to exclude losses if caused in whole or in part, in any sequence of events by an excluded peril. Stephen P. Pate, *Recent Developments in Property Insurance Law*, 33 Tort & Ins. L.J. 659, 663 (1998).

at INS 9; Unitrin Policy, App. at INS 171.) "Flood" is not defined anywhere in the policy. This exclusion will be referred to as the ISO exclusion.

b. State Farm Policy with "Lead-In" Provision

The State Farm policies note at the outset that "We insure for accidental direct physical loss to the property described in Coverage A, except as provided in SECTION I – LOSSES NOT INSURED." They then provide:

> SECTION I – LOSSES INSURED
>
> Coverage A – Dwelling
>
> We insure for accidental direct physical loss to the property described in Coverage A, except as provided in Section I – LOSSES NO INSURED.
>
> SECTION I – LOSSES NOT INSURED
>
> 2. We do not insure under any coverage for loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural

> or external forces, or occurs as a result of any combination of these:[7]
>
> c. (1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these all whether driven by wind or not;

(Doc. 570, Exhibit A and B, pp. 7 and 10).

C. Hartford Policy's specific Flood Definition

Of all of these policies, only Hartford includes an "Amendatory Endorsement Specifically Excepted Perils." (Form H-380). This two page provision provides in relevant part:

> As used herein, Peril means a cause of physical loss or damage to property. It has this meaning whether or not it is called a Peril or a Cause of Loss in this policy.
>
> Even if any of the terms of this policy might be construed otherwise, the following Perils, as described in Paragraphs A. and B. below, are SPECIFICALLY EXCEPTED FROM THIS POLICY. WE DO NOT COVER INSURE AGAINST LOSS OR DAMAGE DIRECTLY OR INDIRECTLY CAUSED BY, RESULTING FROM, CONTRIBUTED TO OR AGGRAVATED BY, OR WHICH WOULD

[7] This subsection is known as the "lead-in" provision.

NOT HAVE OCCURRED BUT FOR, EITHER OF THESE PERILS:

A. ACTS, ERRORS OR OMISSIONS

. . .

3. The design, specifications, workmanship, repair, construction, renovation, remodeling, grading or compaction of all or any part of the following:

b. Roads, water or gas mains, sewers, drainage ditches, levees, dams, or other facilities; . . .

5. The maintenance of any of such property or facilities.

. . .

This exception A. applies whether or not the property or facilities described above are:

1. Covered under this policy; or

2. On or away from the covered premises.

This exception A. does not reduce the insurance for loss or damage caused directly by a Covered Peril.

As used in this endorsement:

1. If this policy is written to cover the risk of loss from specifically named causes, **Covered Peril** means any Peril specifically named as covered;

2. If written to cover the risk of loss without specifying specifically named causes,

Covered peril means any Peril not described above and not otherwise excluded or excepted from the causes of loss covered by this policy.

B. COLLAPSE CRACKING OR SHIFTING of buildings, other structures or facilities, or their parts, if the collapse, cracking or shifting:

1. Occurs during earth movement, volcanic eruption or flood conditions or within 72 hours after they cease; and

2. Would not have occurred but for earth movement, volcanic eruption, or flood.

But if loss or damage by a Covered Peril ensues at the covered premises, we will pay for that ensuing loss or damage.

This exception B. applies whether or not there are other provisions in this policy relating to collapse, cracking or shifting of buildings, other structures or facilities, or their parts. Any such provision is revised by this endorsement to include this exception.

But if this policy specifically covers (by endorsement or in any other way) loss or damage caused by one or more of the following Perils:

. . .

2. Flood:

this exception B. will not reduce that coverage.

As used in this exception B:

. . .

6. flood means:

a. Flood, surface water, waves, tides, tidal water, tidal waves, high water, and overflow of any body of water, or their spray, all whether driven by wind or not;

b. Release of water held by a dam, levy (sic) or dike or by a water or flood control device;

. . .

All other provisions of this policy apply.

(Doc. 568, Hartford Policy, App. at INS 74-75). Thus, Hartford's Amendatory Endorsement Specifically Excepted Perils defines the term "flood" and specifically includes the release of water held by a levee or a flood control device.

VI. Parties' Contentions

Defendants[8] contend that all water damage caused by the canal breach is excluded from coverage as these policies exclude coverage for water damage resulting from a "flood" and that clearly the inundation of the City of New Orleans caused by the failure

[8] The Court would note that while a consolidated memorandum was filed on behalf of the insurers as instructed by the Court, individual arguments were also made. The Court has reviewed these and will only address those specific arguments when they diverge in a relevant way from the whole.

of its levees was a "flood." Seeking the broadest possible definition of the term, defendants maintain that "flood" is not limited to natural events. For this proposition they maintain that under Louisiana law, a court is "required to interpret the term using its plain, ordinary and generally prevailing meaning" and should not enlarge insurance coverage beyond that which is reasonably contemplated. *Cadwallader,* 848 So.2d at 583-84.

Defendants rely on *Kane v. Royal Ins. Co.,* 768 P.2d 678, 681 (Colo.1989) for this proposition. In *Kane,* plaintiffs' property had been damaged by a flood caused by a dam failure. Plaintiffs had in place a certain all-risk policies covering direct physical loss thereto except that which was excluded. The water damage exclusion was identical to the ISO policy noted above; it excepted "flood, surface water, waves, tidal water or tidal waves, overflow of streams or other bodies of water or spray from any of the foregoing, all whether driven by wind or not." *Id.* at 680. The insureds maintained in that suit that the term "flood" was ambiguous as it was not defined and no distinction was made between naturally and artificially caused floods, and as such should have been limited to natural events.

A divided Supreme Court of the State of Colorado held for the insurers. The majority stated:

> The generally accepted meaning of the term "flood" does not include a distinction between artificial and natural floods. For example,

> *Webster's New World Dictionary* 535 (2d ed.1974), defines "flood" as: "[A]n overflowing of water on an area normally dry; inundation; deluge. . . ." *Webster's Ninth New Collegiate Dictionary* 474 (9th ed.1988), defines the term as: "[A] rising and overflowing of a body of water esp[ecially] onto normally dry land. . . ." *Black's Law Dictionary* (5th ed.1979), contains a similar definition: "An inundation of water over land not usually covered by it. Water which inundates area of surface of earth where it ordinarily would not be expected to be." The inundation of insureds' normally dry land falls squarely within these generally accepted definitions of the term "flood."[2] *See Bartlett v. Continental Divide Ins. Co.,* 697 P.2d 412 (Colo.App.1984) (no distinction in insurance policy between natural and artificial causes of flood; to make such distinction would be to rewrite the terms of the policy).

Id. at 681.

Thus, the majority rejected the concept that causation – that is the failure of a man-made object which would cause an "artificial" flood as opposed to a naturally occurring flood – would influence the interpretation of the exclusion. In so finding, it distinguished a prior decision, *Ferndale Development Co. v. Great American Ins. Co.,* 34 Colo.App. 258, 527 P.2d 939 (Colo.App.1974), wherein a Colorado appellate court had found the term "flood" ambiguous and found coverage where a broken city water line caused the "inundation of the footings and foundations of a

partially completed condominiums being constructed by the insured." The majority reasoned that in *Ferndale,* "the term 'flood' was ambiguous not only because the water was released from a man-made object, but also because a water main is not so clearly a 'body of water,'" and because "the amount released was less clearly an 'inundation' or 'deluge'."

Plaintiffs in *Kane* also contended, relying on *Koncilja v. Trinity Universal Ins. Co.,* 35 Colo.App. 27, 528 P.2d 939 (1974), that even if the flood exclusion applied, the "efficient moving cause" of their loss was a covered risk, that is the third party negligence leading to the failure of the Lawn Lake Dam, and coverage should be available. In *Koncilja,* the damage at issue was caused by a broken water pipe embedded in the floor of the house which caused the ground beneath the house to subside which, in turn, caused the house to settle and crack. The homeowners' insurance policy at issue insured against "loss occurring as a result of '[accidental discharge, leakage or overflow of water or steam from within a plumbing . . . system.'" The claim was initially denied based on an exclusion of losses "'caused by, resulting from, contributed to, or aggravated by any earth movement [or] water below the surface of the ground.'" *Kane,* 768 P.2d at 684, citing *Koncilja,* at 940. The *Koncilja* court applied the efficient proximate cause rule that where there is a concurrency of different causes, the efficient cause – the one that sets others in motion – is the cause to which the loss is to be attributed, though the other causes may follow it, and operate

more immediately. *Id.* The *Koncilja* court noted that while the excluded settling of earth may have "operated more immediately in producing the damages, the predominate or efficient proximate cause of the loss was the accidental leakage from the plumbing system." *Id.* Thus, the *Koncilja* court found that as these provisions gave rise to an ambiguity as to the extent of policy coverage, the contract should be construed in favor of coverage.

The majority of Colorado supreme court found that there was no such conflict of provisions of coverage in the *Kane* policies. The majority stated:

> Third party negligence is not a covered risk which creates inconsistency or ambiguity between the language of coverage and the language of exclusion. Although loss from third party negligence is covered under an "all risk" policy, that coverage is expressly subject to the language of the exclusions included in the policy. Under the policy language here, the insureds' loss which is caused by, resulting from, contributed to or aggravated by a flood is excluded regardless of the existence of any other contributing cause. Unlike in *Koncilja,* there is no inconsistency or ambiguity in the inclusionary and exclusionary language of the insurance policies in this case.
>
> Moreover, the "efficient moving cause" rule set forth in *Koncilja* does not control our decision in this case. We believe that the "efficient moving cause" rule, if it were to be

> adopted by this court, must yield to a well-settled principle of law: namely, that courts will not rewrite a contract for the parties. *See, e.g., Republic Ins. Co. v. Jernigan,* 753 P.2d 229, 232 (Colo.1988).

Id. at 685. Thus, the majority held that the term "flood" in the insurance policies at issue included both naturally and artificially caused floods.

Other cases cited by the defendants herein for the proposition that the term "flood" in an insurance policy includes both naturally and artificially caused floods include *Bartlett v. Cont'l Divide Ins. Co.,* 697 P.2d 412, 413 (Colo.Ct.App.1984) (lower court decision concerning apparently the same Lawn Lake Dam collapse finding no distinction between natural and artificial causes where dam failure caused damage); *TNT Speed & Sport Ctr., Inc. v. American States Ins. Co.,* 114 F.3d 731 (8th Cir.1997) (no coverage where vandals removed sandbags and dirt from levee causing levee to break); *Pakmark Corp. v. Liberty Mut Ins. Co.,* 943 S.W.2d (Mo.Ct.app.1997) (no coverage where levee broke); *E.B. Metal & Rubber Indus. Inc. v. Federal Ins. Co.,* 84 A.D.2d 662, 444 N.Y.S.2d 321 (1981) (no coverage for water damaged caused by improperly constructed and maintained dike that failed).

Plaintiffs maintain that the *Kane* majority is incorrect. They argue that in the context of this exclusion, "flooding" is limited to natural events. The "flooding" was not caused by the overtopping of the

levees or by rainwater filling the City with surface water.

Plaintiffs cite to *Riche v. State Farm Fire and Casualty Co.*, 356 So.2d 101 (La.App. 1st Cir.1978), *writ denied,* 358 So.2d 639 (La.1978). In this case, plaintiff sought to recover under his homeowner's policy for the loss of his fishing gear which was on the bass boat of a third-party which sank during a windstorm. The plaintiff maintained that his damage was a direct loss of property defined as "unscheduled personal property" caused by a windstorm which was a named peril under his homeowner's policy. The insurer maintained that the loss was instead caused by wind making waves from surface water, waves causing water to flow into the boat, compounded by a defective bilge pump. Thus, the loss was not caused by windstorm, but by the sinking of a boat. *Id.* at 102.

The appellate court noted that the "direct loss" means the dominant and efficient cause of the loss and that as such, relying on *Roach-Strayhan-Holland Post v. Continental Ins. Co.*, 237 La. 973, 112 So.2d 680 (La.1959) wherein it states "that it is sufficient, in order to recover upon a windstorm insurance policy not otherwise limited or defined, that the wind was the proximate or efficient cause of the loss or damage, notwithstanding other factors contributing thereto." The trial court had held that coverage for the personal property was excluded under the water exclusion provision which provided:

> This policy does not insure against loss:
>
> 3. Caused by, resulting from, contributed to or aggravated by any of the following:
>
> (a) Flood, surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not . . . "

Id. at 103. The appellate court found that "when read as a whole, [this exclusion] contemplates only such damage caused by water **which has risen over and covered areas not ordinarily covered by water.**" *Id.* at 103-04 (emphasis added). The court found this exclusion was inapplicable to damage caused by a windstorm or resulting waves over a body of water, finding that "this interpretation is in line with the rule of construction that exclusionary clauses are strictly construed. *See Bezue v. Hartford Acc. and Indem. Co., Hartford Conn.*, 224 So.2d 76 (La.App. 1st Cir.1969)."

Plaintiffs contend that this case demonstrates that Louisiana courts have construed this water damage exclusion as requiring the **rising over** of water which was not the manner in which the water at issue is alleged to have inundated the insureds' homes. Rather, they maintain it was the negligence of OLD that caused the canal walls to collapse.

Thus, the salient question becomes whether, in the context of an all-risk policy where coverage is provided for direct loss to property, these insurance

provisions which exclude coverage for water damage caused by "flood" clearly and unambiguously exclude from coverage damages caused by the alleged third party negligence of OLD which plaintiffs contend caused a section of the floodwall at the 17th Street Canal to break causing water to enter the streets of the City of New Orleans and homes of the plaintiffs in this suit. While words and phrases in insurance polices are to be construed using their plain, ordinary and generally prevailing meaning, unless the words have acquired a technical meaning, an ambiguity arises where a term is susceptible to two reasonable interpretations. *Cadwallader* 848 So.2d at 580 *citing Carrier,* 759 So.2d at 43-44. Simply put, the question before the court is whether it is reasonable to find in the absence of further definition or provision in the ISO policy that there are two interpretations of the term "flood" – one which encompasses both a "flood" which occurs solely because of natural causes and a "flood" which occurs because of the negligent or intentional act of man and one which limits itself only to a flood which occurs solely because of natural causes.

VII. Definitions and Usage of the Word "Flood" Demonstrate Two Reasonable Interpretations of the Term

The word "flood" can be used as a verb or a noun. In the context of the exclusionary language[9], it is used as a noun[10]. The complete definition in Websters'

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[9] "Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind" is the exact language of the exclusion.

[10] The verb is likewise defined as:

> **2flood** . . . *vt* **1a:** to cover or overwhelm with a flood: INUNDATE, DELUGE <the river ed the lowlands> **b:** to cover or cause to be covered with water or other fluid <in some places it is economical to irrigate by *ing* the fields at regular intervals> < the bearings with oil> **2:** to fill more or less completely with water or other fluid: **a:** to increase the elevation of the water in (a channel) esp. in splashing logs or in nullifying the effectiveness of a fall over a dam; *also:* SPLASH **b:** to supply to (the carburetor of an internal-combustion engine) an excess of fuel sufficient to raise the furl level in the float chamber above the fuel nozzle: to fill (as a compartment of a submarine) with water admitted from the sea **d:** to fill (an oil sand) with water to expel the oil **e:** to apply excessive ink to in printing <the form was SYM>> *ed* and the halftones are too heavy and dark> **3a:** to fill to full capacity or to excess <shoppers ed the streets> <afferent impulsed the brain in certain hysteric states> < *ing* the mails with circulars> **b:** to distribute something in or provide with something in large quantities < *ing* the country with ads> <the romm was *ed* with light> *vi* **1a** To pour or issue like a flood <the milk *ed* over the table>: OVERFLOW <wine *ing* from the glass as her hand shook> **b:** to become filled to excess with some fluid <our cellar s after every heavy rain> *of a tide:* to run

(Continued on following page)

Third New International Dictionary of the English Language Unabridged (1993) is:

> **1 flood . . . *n* . . . 1** *archaic:* a body of moving water (as a river or stream) esp. when large **2a:** the flowing in of the tide: the semidiurnal swell or rise of water in the ocean, there is a tide in the affairs of en which, taken at the, leads on to fortune – Shak.> – opposed to *ebb* **b:** the highest point of a tide <the tide is nearly at the > **3a:** ***rising and overflowing*** of a body of water that covers land not usu. under water: DELUGE, FRESHET <a covenant never to destroy the earth again by – John Milton> – used with *the* to identify a flood os esp. severity or local interest <still date things around here from the, which was about the biggest excitement we ever had> or, usu. cap., the worldwide deluge reported in Gen 7 <the *Flood* in the days of Noah. **b**(1): an outpouring of considerable extent <gave way in a > of tears> (2): a great downpour <raining in *s* > **4:** the element water <the rocky shore that forms a barrier between earth and > < willing to go through fire and to gain his objective> **5a** a great stream of something (as light or lava) that flows in a steady course **b:** a large quantity widely diffused: SUPERABUNDANCE <a of

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high <could tell how the tide was *ing* – G.W.Brace> **2:** to have an excessive menstrual flow or a uterine hemorrhage after childbirth

> spurious bank notes> > soon had a of invitations> **6:** FLOODLIGHT **syn** see FLOW

Explanatory Note 12.4 which explains the numerical divisions contained in the definition states:

> The system of separating by numbers and letters reflects something of the semantic relationship between various senses of a word. It is only a lexical convenience. It does not evaluate senses or establish and enduring hierarchy of importance among them. The best sense I the one that most aptly it's the context of an actual genuine utterance.

Id. at 17a. The Compact Oxford English of Current English Dictionary (2005) defines "flood" as "**an overflow** of a large amount of water over dry land." (emphasis added).

> Other definitions include:
>
> A general and temporary condition of partial or complete inundation of normally dry land areas from (1) ***overflow of inland or tidal waters,*** (2) the unusual ***accumulation and runoff*** of surface waters from any source, or (3) abnormal, flood-related erosion and undermining of **shorelines.** Flood also means inundation from mud flows caused by accumulations of water on or under the ground, as long as the mud flow and not a landslide is the proximate cause of loss.
>
> InsWeb Article: Property Insurance Terms provided by BISYS Education Services, Inc. (emphasis added) *See* http://www.insweb.com/

> learningcenter/glossary/property-f.htm. The American Heritage Dictionary of the English Language: Fourth Edition (2000) defines it as "an ***overflowing*** of water onto land that is normally dry. (emphasis added). Cambridge Dictionaries Online defines it as "a large amount of water covering an area that is usually dry." *See* http://dictionary.cambridge.org. Thus, the majority of the definitions of the noun "flood" found independently by the Court require an "overflowing" or an "overtopping".

Accordingly, based on these definitions of "flood", it is clear to this Court that implicit in the "overtopping" definitions, a natural event caused by rain or tide is contemplated. Thus, these definitions alone provide evidence that a reasonable interpretation of the term "flood" would be inundation caused by a natural event.

This analysis, however, is further buttressed when examined in the "sense" that is gained by the context of the word as noted in the explanation of definitions contained in *Webster's Unabridged.* The term "flood" is unequivocally contained in an exclusionary clause in the insurance policies at issue. As noted, "once coverage has been extended, . . . , it should be withdrawn only when exclusion is established with certainty." *Pullen v. Employers' Liability Assur. Corp.,* 230 La. 867, 89 So.2d 373, 377 (1956). Thus, the plethora of insurance case law where the issue of causation is at play with respect to the application of a water damage exclusion is a further

demonstration that this term is subject to two reasonable interpretations.

VIII. Jurisprudence Further Demonstrates Reasonableness of Alternative Interpretations

A. "Flood" is Limited to Naturally Occurring Events

While defendants have cited to a number of cases where courts have found "flood" to be unambiguous and have denied coverage where even negligence or intentional acts have caused the water damage at issue, there are other cases where courts have held that the term "flood" contemplates only a naturally occurring event. In *Popkin v. Security Mut. Ins. Co.*, 48 A.D.2d 46, 367 N.Y.S.2d 492 (1975), the court found that the term "flood" did not contemplate water damage sustained as the result of a broken water main. It noted that the term connotes an inundation or deluge. The court continued, basing its reasoning on the *ejusdem generis* rule and *noscitur a sociis,* "Even assuming that the word 'flood' is to be given a more generic meaning as an overflowing abundance or a great quantity, **it must be noted that the other terms utilized in the exclusionary clause containing such word relate to natural phenomena.**"[11] *Id.* at 495 (emphasis added). Another

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[11] That exclusionary clause provided in relevant part that the policy at issue did not insure against " '(l)oss caused by, resulting from, contributed to or aggravated by any of the following: . . . 2. flood, surface water, waves, tidal water or tidal

(Continued on following page)

New York court, cited *Popkin* concluding that the exclusionary provisions pertain only to damages arising from natural causes. *Ender v. National Fire Ins. Co. of Hartford,* 169 A.D.2d 420, 421, 563 N.Y.S.2d 85 (1991).

An Arkansas appellate court likewise found that a similar water exclusion as presented in the State Farm policy contemplated only flooding that results from a natural cause. In *Ebbing v. State Farm Fire & Cas. Co.,* 67 Ark.App. 381, 1 S.W.3d 459 (Ct.App. Ark. Div. III 1999), insureds sought coverage for water damage caused by a burst pipe where their State Farm homeowners policy excluded coverage for water damage "meaning flood, surface water, waves tidal water, overflow of a body of water, or spray from any of these, all whether driven by wind or not. . . ." The court examined the meaning of both the term "surface water" and "flood". Adopting the Colorado appellate court's reasoning in *Ferndale, supra,* it found that its common usage applies to "water occasioned from natural events rather than a burst water main."

In a Massachusetts case, *Mellon v. Hingham Mut. Fire Ins. Co.,* 19 Mass.App.Ct. 933, 472 N.E.2d 674 (1984), insureds suffered damages after a drainage pipe beneath a basement broke and were denied coverage. In interpreting an all-risk policy of insurance clause which excluded loss "'caused by, resulting

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wave, overflow of streams or other bodies of water or spray from any of the foregoing, all whether driven by wind or not; . . .

from, contributed to or aggravated by . . . water below the surface of the ground including that which exerts pressure on or flows, seeps or leaks through basement. . . . floors,'" the appellate court noted, "An 'all risk' policy is intended to insure against a 'fortuitous' event. . . . Moreover, such fortuities are insured against even if they are not specified in the policy . . . As an insurer has the option to exclude from coverage certain risks, . . . it is not surprising that 'all risk' policies contain specific exclusions." *Id.* at 675 (citations omitted). The court continued:

> When we apply the foregoing principles in the instant case the reasons why the plaintiffs should prevail become apparent. The plaintiffs may recover if the bursting of the drainage pipe is considered a fortuity and if such fortuity has not been specifically excluded. With respect to the former, Hingham concedes that the damage was incurred as a result of a fortuity. The trial judge found, and we agree, that the "loss was caused by an accidental break rather than a natural occurrence." As such, it is the kind of risk an "all risk" policy is designed to cover.

Id. at 675-76 (footnote omitted). Thus, Massachusetts viewed a similar exclusion as only excluding damages caused by natural circumstances.

As noted in *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 509 S.E.2d 1 (1998):

> A provision in an insurance policy may be deemed to be ambiguous if courts in other jurisdictions have interpreted the provision in different ways. **This rule is based on the understanding that "one cannot expect a mere layman to understand the meaning of a clause respecting the meaning of which fine judicial minds are at variance."** C. Marvel, *Division of Opinion among Judges on Same Court or among other Courts or Jurisdictions Considering same question, as Evidence That Particular Clause of Insurance Policy is Ambiguous,* 4 A.L.R.4th 1253 § 2[a] (1981).

Id. at 485 n. 5, 509 S.E.2d 1 (emphasis added). So, this diversion of opinion gives support to the conclusion that the ISO flood exclusion is ambiguous.

B. Distinguishing Factors of Cases in Which "Flood" Included Water Damage Caused by Negligent or Intentional Acts from the Case at Bar

Furthermore, the primary cases on which defendants' rely can be distinguished. For instance, with respect to *TNT Speed & Sport Center, Inc. v. American States Ins. Co.,* 114 F.3d 731 (8th Cir.1997), the flood at issue had resulted from an unknown third party's removal of sandbags and dirt from levee surrounding city from rising river. The Eighth Circuit did not consider whether the term "flood" referred only to naturally occurring events or whether it included man-made causes. Rather in that instance it

based its analysis on the "anti-concurrent" cause clause finding that it defeated the efficient proximate cause doctrine and thus the plaintiff's damages were excluded under the policy.[12] Thus, the issue as to whether "flood" concerned only natural occurring events was not addressed.

In *Pakmark Corp. v. Liberty Mut. Ins. Co.*, 943 S.W.2d 256 (Mo.Ct.App.1997), likewise, whether "flood" was limited to naturally occurring events and did not include man-made events was not contemplated. In this case, sewerage backed up into insured's building at the same time water overflowed the Missouri River entering the insured's property. The focus of that case again was the anti-concurrent clause.

In *E.B. Metal & Rubber Ins. Inc. v. Fed. Ins. Co.*, 84 A.D.2d 662, 444 N.Y.S.2d 321 (N.Y.S.Ct.App.1981), a dike on a canal gave way and water inundated the insured's property. The policy at issue in that case excluded damages caused by "'flood meaning waves, tidal water or tidal wave, rising (including overflowing ***or breaking of boundaries)*** of lakes, reservoirs,

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[12] As noted, Louisiana courts have recognized the primacy of the efficient proximate cause doctrine and, to this Court's knowledge, having examined the issue for these purposes, no Louisiana courts has directly held that an anti-concurrent cause clause automatically overrides concerns of efficient proximate cause. Nonetheless, that being said, this Court recognizes that parties may contract in any manner they want and could obviously exclude coverage using an anti-concurrent cause clause. However, that exclusion must be clear and unambiguous.

rivers, streams or other bodies of water, whether driven by wind or not. The court there simply found that the damages were excluded as long as there were "rising waters which break through boundaries and flow upon the insured's land to constitute a flood." *Id.* at 663, 444 N.Y.S.2d 321 (emphasis added). This specific language is not present in the ISO policy at issue herein.

C. The Dissent in *Kane* Further Demonstrates the Reasonableness of the Two Interpretations

Another illustration of the ambiguity or tension between these two interpretations of the term "flood" is contained in the minority opinion found in *Kane* wherein a three-person minority wrote a stinging dissent. The dissent stated unequivocally that the term "flood" as used in the policy was ambiguous and that the "'all-risk' policies in question cover[ed] damage caused by the negligent acts of a third party or any other source not specifically excepted from coverage by the exclusionary clauses of the polices." *Kane,* 768 P.2d at 687. As to the argument that the unmodified term "flood" should be interpreted to refer only to inundation caused by natural conditions or events, the minority noted:

> The plaintiffs argue that "flood" should be interpreted to refer only to inundations caused by natural conditions or events. In this case, the term "flood" in the exclusionary clauses is found in the context of natural causes of

> flooding, i.e., "flood, surface water, waves, tidal water or tidal waves, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not." This in itself indicates that the term "flood" could be interpreted as encompassing only natural causes. *Cf. Bly v. Auto Owners Ins. Co.*, 437 So.2d 495, 496-97 (Ala.1983) (term "earth movement" in insurance policy encompasses only natural phenomena involving earth movement because examples mentioned in policy are only natural phenomena); *Ariston Airline & Catering Supply Co. v. Forbes,* 211 N.J.Super. 472, 511 A.2d 1278, 1284 (Law Div.1986) ("words 'earth movement,' like other language in policies being construed, must be read in the light of other words contained in the same exclusion").

Several courts have interpreted similar insurance policy provisions in just this way. *See, e.g., Robert Dorsen, Inc. v. Aetna Casualty & Sur. Co.*, 562 F.Supp. 495, 496 (D.D.C.1983). *See also* 5 J. Appleman, *Insurance Law and Practice* § 3145, at 462-63 (1970). Indeed, in the present case the district court initially interpreted the policy provisions to encompass only flooding by natural causes and not to include "a situation of an artificially-impounded or contained body of water that escapes and causes damage." *Kane v. Royal Ins. Co.*, No. 83CV603, slip op. at 2-3 (Dist. Ct. Larimer Co., Feb. 28, 1984) (Dressel, J.) (the district court later reversed this decision since it viewed as binding the Colorado

Court of Appeals decision in *Bartlett v. Continental Divide Insurance Co.*, 697 P.2d 412 (Colo.App.1984)). These authorities, of course, do not compel us to take the same view, but they do provide support for a conclusion that the term "flood" as contained in insurance policies is ambiguous. *See* Annot., *Division of Opinion as Evidence that Particular Clause of Insurance Policy is Ambiguous,* 4 A.L.R.4th 1253 (1981) (existence of differing interpretations of a term among or within jurisdictions is evidence of ambiguity of the term).

> In sum, I believe the term "flood" as contained in the insurance policy is ambiguous. *See Ferndale,* 34 Colo.App. 258, 527 P.2d 939 (1974); *Mateer v. Reliance Ins. Co.,* 247 Md. 643, 233 A.2d 797 (1967) (term "flood" is latently ambiguous when used in an insurance policy). Ambiguous terms in an insurance policy are to be construed most strongly against the insurer. *Republic Ins. Co. v. Jernigan,* 753 P.2d 229, 232 (Colo.1988); *Reed v. U.S. Fidelity & Guar. Co.,* 176 Colo. 568, 572, 491 P.2d 1377, 1379 (1971). Therefore, I would hold that inundation caused by the breakage of a dam is not excluded from coverage by the flood provisions of these policies.

Id. at 686-87. Likewise, the minority found that the overruling of Koncilja as it concerned the jettisoning of the efficient proximate cause rule incorrect. *See discussion, supra,* at 745. The minority reasoned:

> The majority apparently concedes that third party negligence, such as negligence in the design, construction, or operation of the dam, is covered by the "all risk" policies in this case. However, the majority also concludes that there is no inconsistency because that coverage is "expressly subject to the language of the exclusions included in the policy." Maj. op. at 685. This approach has the effect of treating the events leading up to the damage of the petitioners' place of business as a single cause by implicitly saying that third party negligence is covered under the policy but not if the third party negligence causes flooding. I believe this approach misapprehends the rationale underlying *Koncilja*. There was more than one "cause" of the petitioners' damage in this case. There was third party negligence in the design, construction or operation of the Lawn Lake Dam or some other cause that resulted in failure of the dam, and there was the "flood" which was "caused" or put in motion by the precipitating cause of the breakage of the dam.

In *Hatley v. Truck Insurance Exchange,* 261 Or. 606, 494 P.2d 426 (1972), vandals caused flooding of the plaintiffs' place of business. Vandalism was covered by the policy but loss resulting from "flood," "surface water" or "water below the surface of the ground" was excluded from coverage. The Oregon Supreme Court did not hold, as the majority in this case apparently would, that the vandalism that caused flooding was not covered by the policy. Rather,

the court, using an analysis very similar to that in *Koncilja,* determined that there were two causes of the plaintiffs' damage and that the policy covered this damage since the vandalism "cause" was the direct or immediate cause of the water damage. *Id.* 494 P.2d at 431-32. *Accord Beauty Supplies, Inc. v. Hanover Ins. Co.,* 526 S.W.2d 75 (Mo.Ct.App.1975); *Franklin Packaging Co. v. California Union Ins. Co.,* 171 N.J.Super. 188, 408 A.2d 448 (App.Div.1979).

> I believe that this is also the proper method of analysis under *Koncilja.* Third party negligence or some other source resulting in breakage of the dam was one cause of the damage to the petitioners' place of business and the "flooding" was another cause. However, because the precipitating cause of the failure of the dam set in motion the flooding, the policy should be construed in favor of coverage, if the precipitating cause is not itself excluded from coverage. *See Koncilja,* 35 Colo.App. at 30-31, 528 P.2d at 940-41.

Id. at 687-88.

Nonetheless, the Court must note that the issue of efficient proximate cause as it relates to an anti-concurrent cause clause arises only where a covered peril and an excluded peril are present. Thus, if this Court were to find that the "flood" exclusion does not encompass flooding caused by negligent or intentional acts, the issue of efficient proximate cause and/or the applicability of an anti-concurrent cause clause is not triggered at this stage of the litigation. However, the

Court does agree that exclusions that are clear may also eviscerate the doctrine of efficient proximate cause. Nonetheless, as this litigation proceeds, if it is shown that an insured premises sustained damage from a covered peril, i.e. wind or water damage caused by a failed levee caused by negligence, and a non-covered peril, i.e. naturally occurring flooding such as overtopping of a levee, then the Court must determine the applicability and enforceability of the anti-concurrent cause clause.

D. Earth Movement Litigation Provides Further Demonstration of Reasonableness of Two Interpretations – *Natural v. Man-Made*

Additional support for the proposition that exclusions can be limited to natural occurring incidents as opposed to those caused by the negligent or intentional acts of man can be found in cases where the earth movement exclusions of all-risk policies are at issue. In *Murray v. State Farm Fire and Cas.*, 203 W.Va. 477, 509 S.E.2d 1 (1998), the West Virginia supreme court considered certain earth movement exclusions where policy holders sought coverage for damages caused by rocks falling from the highwall of a 40-year old abandoned rock quarry situated next to their homes. The insurers initially denied coverage based on exclusions for losses resulting from "earth movement, including but not limited to . . . landslide . . . [or] erosion." *Id.* at 483, 509 S.E.2d 1. The circuit court granted summary judgment in favor of the

insurers, and the supreme court reversed. Evidence in the record demonstrated that negligent construction of the highwall behind the plaintiffs' residences contributed to the rockfall. Using the same rules of insurance contract interpretation as Louisiana, the court noted:

> On the one hand, the exclusions cited in the defendant's policies could bar coverage for solely *natural* events such as earthquakes, volcanic eruptions, and sinkholes. On the other hand, the same exclusions refer to events which could be *man-made,* such as subsidence or earth movement caused by equipment or a broken water line. Or as alleged in this case, earth movement could be caused by *both man and nature* over a period of time, such as landslides, mudflows, or the earth sinking shifting or settling. Because the policy language is reasonably susceptible to different meanings, we believe that the earth movement exclusions in the insurance polices at issue are ambiguous, and must have a more limited meaning than that assigned to it by the defendants.

Id. at 485, 509 S.E.2d 1. The court then applied the two doctrines of *ejusdem generis and noscitur a sociis* to conclude that both earth movement exclusions at issue therein must be read "to refer only to phenomena resulting from natural, rather than man-made forces." *Id.* at 486, 509 S.E.2d 1. The court stated:

> Therefore, when an earth movement exclusion in an insurance policy contains terms

> not otherwise defined in the policy, and the terms of the exclusion relate to natural events (such as earthquakes or volcanic eruptions), which events, in some instances, may also be attributed to a combination of natural and manmade causes (such as landslides, subsidence or erosion), the terms of the exclusion must be read together and limited to exclude naturally-occurring events rather than man-made events.

Id.

It should be noted that in *Change, Inc. v. Westfield Ins. Co.*, 208 W.Va. 654, 542 S.E.2d 475, 479 (2000), the West Virginia supreme court subsequently applied the same analysis to the ISO water exclusion to find that there was coverage provided where a water main owned by the City of wheeling ruptured and damage the offices of the insured. The court stated:

> The doctrine of *noscitur a sociis* dictates that language should be construed in accordance with the words which are its associates. The Court observes that the words of the exclusionary language specifically exclude damage by flood, surface water, waves, tides, tidal waves, etc. these words all refer to water arising from natural causes or from natural disasters. On the other hand, the language of the exclusionary clause includes in coverage damage by sprinkler leakage, that is, water from a manmade system."

Id. at 479.

The Florida supreme court likewise found that an ISO earth movement exclusion applied only to earth movement brought about by natural events and did not apply to damage caused by a man-made event such as blasting. In *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So.2d 1082 (Fla.2005), the court utilized the same principles of insurance contract interpretation noting that "if the salient policy language is susceptible to two reasonable interpretations, one providing coverage and the other excluding coverage, the policy is considered ambiguous. *Id.* at 1086 (citations omitted). It also noted that "exclusionary clauses are construed more strictly against the insurer than coverage clauses." *Id.*

In its analysis the court noted the practical differences for the insurer between losses caused by natural occurrences as opposed to man-made occurrences. The insurer would have the right to subrogation against the tort-feasor in the event that the loss was caused by a man-made event, rather than a natural occurrence. This factor from an underwriting standpoint supports the proposition that the insurer was excluding a loss for which it had no recourse. The court also remarked that the exclusion at issue in *Fayad* did not contain the State Farm lead in provision which excludes "regardless of the cause" earth movement, and that the vast majority of the courts found the earth movement provision limited to damage caused by natural phenomena. Since the cause of the insured's loss was blasting, which was not expressly listed as a causal event that would preclude

coverage for resulting damage, the court again used the principle of *ejusdem generis* and limited the exclusion to earth movement caused by a natural event.

Finally, it is also important that in *Peach State Uniform Serv. Inc. v. American Ins. Co.,* 507 F.2d 996 (5th Cir.1975), the appellate court reversed the jury findings of the district court with respect to the applicability of a water exclusion and an earth movement exclusion where the foundation of a building gave way and a portion of the building collapsed after heavy rains. The insurer maintained that the undermining of the foundation was caused by run-off water washing away uncompacted fill dirt from underneath its foundation and thus the damage was excluded from the "all-risk" policy based on the earth movement and water damage exclusions. The insureds maintained that the collapse was caused by the caving in of a portion of a sewer line which ran directly underneath the building in question.

The court in commenting on the water damage exclusion[13] noted, "while the term water damage may

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[13] The exclusion provided: "This policy does not insure against loss or damage resulting from: . . . " (N) water damage caused by, contributed to, or aggravated by any of the following:

(1) Flood, surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing . . . ,

(2) Water which backs up through sewers or drains,

(3) Water below the surface of the ground. . . .

Id. at 998

be used in the abstract to refer to any sort of damage worked by water or the motion of water, . . . here we must take the phrase in context, not in the abstract." *Id.* at 998. The court concluded that "the term water damage in this context constitutes a limitation on the sorts of damages from the enumerated water which were excluded from coverage." It further concluded that the exclusion was ambiguous and found that it was inapplicable to the damages at issue. *Id.* at 999. The court then examined the earth movement exclusion[14] and using the principle of *ejusdem generis* found it applicable to damages caused by actual movement of earth itself, not superficial effects of external forces.

E. Distinctions from Civilian Approach Further Demonstrates Inapplicability of *Kane* to the Case at Bar

In considering whether the *Kane* majority approach should guide this court, certain distinguishing facts militate against such a course of decision. In the *Kane* analysis, the fact that the term "flood" was imbedded in an exclusion rather than in the coverage provision, was apparently ignored in that the Court applied the broadest possible definition to flood, rather than narrowly construing an exclusion. It appears that the definition used by the *Kane* court

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[14] This exclusion provided "this policy does not insure against loss or damage resulting from: (B) Earthquake, volcanic eruption, landslide or other earth movement. . . ." *Id.* at 999.

was more akin to the definition of the verb "flood" than the noun "flood." Thus, this analysis ignores one basic tenet of Louisiana law – that is an insurance policy is a contract of adhesion and that an exclusion must be narrowly construed. Furthermore, another important distinction can be found in the majority opinion of *Kane.*

The majority also noted in distinguishing *Ferndale,* as discussed, *supra* at 745 that:

> In addition to the factual distinction between *Ferndale* and this case, the definition of "flood waters" upon which the *Ferndale* court relied supports our conclusion that the term "flood" is not ambiguous under the facts of this case. The *Ferndale* court quoted from 5 J. Appleman, *Insurance Law and Practice* § 3145 (1970), as follows: "'Flood waters' are those waters above the highest line of the ordinary flow of a stream, and generally speaking they have overflowed a river, stream, or natural water course and have formed a continuous body with the water flowing in the ordinary channel. . . ." *Ferndale,* 527 P.2d at 940.
>
> Although leakage from a ruptured city water line does not fall within this definition, **the rising and overflowing of Fall River does.** This definition makes no distinction between naturally and artificially caused floods, **and in this case, the Fall River clearly overflowed "above the highest line of [its] ordinary flow."**

Kane, 768 P.2d at 681-82. Thus, it appears that the failure of the Lawn Lake Dam was caused by over-topping which would factually distinguish it from the facts before the Court where the allegations are not of flooding caused by the flood wall's failure from over-topping, but rather the flood walls' collapse when faced with conditions they were allegedly designed to withstand.

Another distinction can be found with respect to the *Kane* majority in its discussion of *Koncilja, see discussion, supra,* 745. As noted, the Colorado supreme court stated that if the "efficient moving cause" rule "were to be adopted by this court," it must yield to the "a well-settled principle of law: namely, that courts will not rewrite a contract for the parties. *See, e.g., Republic Ins. Co. v. Jernigan,* 753 P.2d 229, 232 (Colo.1988)." *Kane,* 768 P.2d at 685. This statement would indicate that at least the Colorado supreme court had not embraced the efficient moving cause principle. However, Louisiana's courts consistently apply the efficient proximate cause rule in resolving coverage issues. *Lorio v. Aetna Ins. Co.,* 255 La. 721, 232 So.2d 490 (La.1970) which again distinguishes the *Kane* majority approach from the case at hand.

IX. Application of Legal Principles to the Policies Before the Court

A. ISO Water Damage Exclusion

1. ISO Water Damage Exclusion Standing Alone Is Ambiguous and Must Be Interpreted Against the Insurer to Find Coverage

Based on these principles, the Court now examines the "Water Damage Exclusion" in the ISO policies in the context of a Rule 12(b) motion, where the Court is required to take all of the allegations as true. The fundamental argument made by the ISO insurers is that the word "flood" is all encompassing. They point out that the water damage which occurred to homes and businesses in New Orleans has been referred to as a "flood" in newspapers, general reports and many other sources. And thus, the water exclusion applies to the coverage sought by policy holders herein.

As demonstrated earlier, the word "flood" has numerous meanings. It is defined in virtually all dictionaries first as a noun then as a verb. In the policies being examined by the Court it is used as a noun. As noted, most of the definitions of the noun imply encroachment of water caused by an act of nature. Furthermore, this exclusion has been the subject of differing interpretations in the jurisprudence which further demonstrates that it is susceptible of two reasonable interpretations. As such, under Louisiana civilian principles and the *jurisprudence*

constant, this Court finds the ISO Water Damage Exclusion ambiguous.

The policies before the Court are "all-risk" policies, and any exclusion must be clear and unambiguous. "Words susceptible of different meanings must be interpreted as having the meaning that best conforms to the object of the contract." La. Civ.Code. art 2048. Thus, this Court is required to examine the insurance policies before it in the context of the purpose of the policy including the scope of the risks against which it purports to insure. "Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole." La. Civ.Code art. 2050. Water damage could occur to a home or business for a myriad of reasons and any number of causes. The causes can be natural, *i.e.* overflow of river banks, intense rain, etc., or man-made, *i.e.,* the failure of a dam or levee, a vandal destroying a above ground swimming pool, a vehicle hitting a water main, etc.

As a general rule, insurance policies should be construed to effect, not deny coverage. *Holden v. Connex-Metalna,* 2001 WL 40994 at *2 (E.D.La. Jan.16, 2001) *citing Breland v. Schilling,* 550 So.2d 609 (La.1989). Furthermore, as previously noted where the Court finds an ambiguity, it must ascertain how a reasonable insurance policy purchaser would construe the clause at the time the insurance contract was entered and fulfill the reasonable expectations of the insured even though a careful examination of the policy provisions indicate that such expectations are

contrary to the expressed intention of the insurer. *Louisiana Ins. Guar. Assoc.*, 630 So.2d at 764 and n. 19.

It is the considered opinion of this Court that because the policies are all-risk, and because "flood" has numerous definitions, it reasonably could be limited to natural occurrences. Simply put, the language of the ISO Water Damage Exclusion chosen by the insurer is unclear. Indeed, the broad definition defendants seek to employ – that is that the term "flood" means the inundation of usually dry land by water – makes the remaining part of the exclusion superfluous. The ensuing words "waves, tidal water, overflow of a body of water or spray from any of these, whether or not driven by wind" all are instances relating to **natural** events which can cause inundation of usually dry land. Thus, to use the broadest definition of the term "flood" in interpreting this exclusion, would render the rest of the clause useless.

Under the principles of Louisiana law, the Court is constrained to find the language ambiguous. To find otherwise, leads to absurd results. Once this finding is made, the Court is further constrained to interpret it against the insurer. "If there is any doubt or ambiguity as to the meaning of a provision in an insurance policy, it must be construed in favor of the insured and against the insurer. *See* La. C.C. art.

2056.[15] When the ambiguity relates to an exclusionary clause, the law requires that the contract be interpreted liberally in favor of coverage." *Arnette v. NPC Services, Inc.*, 808 So.2d 798 (La.App. 1st Cir.2002) *citing Borden, Inc. v. Howard Trucking Co., Inc.* 454 So.2d 1081, 1090 (La.1983). The term "flood" is in the context of an exclusion and thus must be narrowly construed. "Under this rule of strict construction, equivocal provisions seeking to narrow an insurer's obligation are strictly construed against the insurer. *Carrier,* 759 So.2d at 43." *Cadwallader,* 848 So.2d at 580 (emphasis added); *Calogero v. Safeway Ins. Co. of La.*, 753 So.2d 170 (La.2000). *See, generally,* 15 William McKenzie and H. Alston Johnson, III, *Louisiana Civil Law Treatise: Insurance Law and Practice* § 4 at 6-9 (2d ed.1996).

Support for limiting this exclusion in the context of an all-risk policy is further demonstrated in the Louisiana supreme court's decision in *Doerr v. Mobil Oil Corp.*, 774 So.2d 119 (La.2000). In *Doerr,* a refinery discharged hydrocarbons into the Mississippi River which were drawn into the St. Bernard Parish water system and then distributed to users throughout the parish. Plaintiffs in that case sought compensation from St. Bernard Parish and its insurers for personal injuries allegedly sustained from the use

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[15] "A contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party." La. Civ.Code. art. 2056.

and/or consumption of the allegedly contaminated water. *Id.* at 121.

The Louisiana supreme court examined a total pollution exclusion endorsement in the policy and analyzed its previous decision in *Ducote v. Koch Pipeline Co.,* 730 So.2d 432 (La.1999). In *Ducote,* the supreme court had previously held that pollution exclusions were unambiguous and excluded coverage for injury "which would not have occurred in whole or in part but for the [dispersal] of pollutants at any time." *Ducote,* 730 So.2d at 432, 437. The *Doerr* court noted that this holding made it irrelevant as to who precipitated the alleged pollution and re-examined the pollution exclusion itself.

The *Doerr* policy read:

> This insurance does not apply to:
>
> (1) "Bodily injury", "property damage", "personal injury" or "advertising injury" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time.
>
> (2) Any loss, cost or expense arising out of any:
>
> > (a) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or

> (b) Claim or suit by or on behalf of a governmental authority or others for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants. Pollutants means solid liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste. Water includes material to be recycled, reconditioned or reclaimed.

Id. at 122-23. The court noted that as written: [T]he exclusion can be read to exclude coverage for anything from the release of chlorine gases by a conglomerate chemical plant to the release of carbon monoxide from a small business owner's delivery truck. It could be read to exclude injuries resulting from a slip and fall on an oil-slicked beach to a slip and fall on spilled gasoline at a corner service station. As pointed out in *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043 (7th Cir.1992):

> without some limiting principle, the pollution exclusion clause would . . . lead to some absurd results. To take but two simple examples, reading the clause broadly would bar coverage for bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injury caused by an allergic reaction to chlorine in a

> public pool. Although Drano and chlorine are both irritants or contaminants that cause, under certain conditions, bodily injury or property damage, on would not ordinarily characterize these events as pollution.

Id. at 124.

The court then examined the origin of the Total Pollution Exclusion and concluded that its purpose was to exclude coverage for environment pollution with respect to the active polluter of the environment, not to apply unambiguously "regardless [as the majority stated in *Ducote*] of whether the release was intentional or accidental, a one-time event or part of an on-going pattern of pollution." *Doerr* at 126, *citing, Ducote,* 730 So.2d at 437. The court continued "In fact, to give the pollution exclusion the broad reading found in *Ducote* would contravene the very purpose of a CGL policy, without regard to the realities which precipitated the need for the pollution exclusion – the federal government's war on active polluters." *Doerr* at 126. The court concluded:

Commercial General Liability policies are purchased by both large and small business owners in an attempt to protect against losses that may result from unforeseen liability-imposing events or circumstances. As stated in Section I(A)(1)(a) of the policy at issue here, the issuer of a liability policy "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." Business owners rely on these policies to protect them

against claims and losses which might otherwise force insolvency or prompt serious losses. The insurance company, on the other hand, agrees to absorb liability to which the business might otherwise be exposed in return for a premium which, along with the premiums of other insureds, is designed to adequately spread potential losses among all of the insurer's clients. These businesses come to rely on the liability policies because, without them, a single large claim might force insolvency or an intolerable monetary loss. Consequently, business owners expect that any exclusions within their policy will be read reasonably and with due regard to the intent of the policy as a whole. Giving these pollution exclusions a strictly literal reading without regard to the limited purpose behind their post-CERCLA formation would thwart the very purpose of the comprehensive general liability policy.

Both liability insurers and their insureds have certain expectations regarding issuance of a CGL policy. The liability insurer expects premiums in exchange for a certain level of risk, and the insureds expect to be insulated generally from liability claims. **A literal reading of the total pollution exclusions would alter the general scope and expectation of the parties. Consequently, because the pollution exclusion was designed to exclude coverage for environmental pollution only, it should be interpreted so that the clause "will not be applied to all contact with substances that may be classified as pollutants."** Russ,

supra, at § 127:6 n. 62 (citing *Stoney Run Co. v. Prudential-LMI Comm. Ins. Co.,* 47 F.3d 34, 37 (2nd Cir.1995)). As *Ducote* conflicts with the intent of the policy exclusion and disrupts the expectations of both insurers and insureds, that opinion will be overruled at this time. *Doerr,* 774 So.2d at 127-28 (footnote omitted) (emphasis added).

Likewise, defendants' seeking to employ the broadest possible definition of "flood" in the context of the ISO Water Exclusion would result in the evisceration of what an "all-risk" policy is meant to cover. Certainly the damage sued upon was caused by flooding; but was the flooding caused by negligent acts or omissions excluded by the plain language of the policy? The insurers could have drafted such a clear exclusion with very little effort, but they did not. As discussed herein, this precise issue, natural causes versus man-made causes, has been dealt with by various courts for a number of years. If the insurers, who wrote every word of the respective policies, wanted to make the language clear, that "flood" means water damage caused by negligent acts or omissions, it could have so drafted the policy language. For reasons only known to the insurer, it chose not to do so.

As is discussed, *infra,* in the sections concerning the State Farm policy and the Hartford policy, these insurers succeeded with very little effort in clearly excluding coverage for negligent acts or omissions. Indeed, if a consumer were to actually read the three different policy language presented in this case, one

would expect that he or she would choose the ISO policy as it would be reasonable to assume that by comparison, it only excludes coverage for natural acts, unlike the other two policies. To find that the ISO language clearly excludes negligent acts would be to reward and encourage the use of vague language. This determination is underscored by the fact that the tension between natural flooding and flooding caused by negligent or intentional acts has existed for decades; obviously, some insurers made efforts to be clear in their intentions.

Furthermore, the defendant argues if the word "flood" does not include acts of negligence or omission, then the flooding which may occur as result of pumps not working in a heavy rain causing the streets to overflow with water would be covered under the policy. The Court disagrees. In that situation, the efficient proximate cause would be the natural occurrence of rain and the overflowing of the streets, not the failing of the pumps, and there would therefore would be no coverage as the cause efficient proximate cause was a natural act. What must be remembered is that the allegations in this matter revolve around the concept that the flood walls involved collapsed precisely under the conditions that they were designed to withstand. If the pumps failed at a point which they were designed to handle, then arguably negligence might be present.

2. Existence of NFIP Does Not Change Analysis

Insurers also argue that the existence of the National Flood Insurance Program ("NFIP") demonstrates that these policies are not meant to cover flooding of any sort. The existence and scope of the NFIP has no bearing on the rules of contractual interpretation that this Court must apply as to whether an exclusion in a policy is ambiguous. Moreover, the Standard Flood Insurance Policy ("SFIP") does not purport to cover all water damage that could occur to a structure. In the SFIP under the NFIP, "Flood" is defined as follows:

> 1. A general and temporary condition of partial or complete inundation of two or more acres of normally dry land area or of two or more properties (one of which is your property) from:
>
> a. Overflow of inland or tidal water,
>
> b. Unusual and rapid accumulation or runoff of surface waters from any source,
>
> c. Mudflow.
>
> 2. Collapse or subsidence of land along the shore of a lake or similar body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels that result in a flood as defined in A. 1.a. above.

44 C.F.R. Ch.1 (10-1-04 Edition) Pt. 61, App. A(1). If an insurer wanted to exclude coverage for damages

covered by a national insurance program, it could so state in the relevant exclusion. Furthermore, "[i]t is the reasonable interpretation of an insured that governs the legal effect of language in an insurance contract, and not whether the language chosen by an insurer may constitute a legal term of art in another context. *Lee v. Unum Life Ins. Co. of America,* 900 So.2d 1021, 1029 (La.App. 4th Cir.2005).

The Court also takes note that as a result of the 100 Year Flood Plane that was in effect at the time of Katrina, some lenders did not required a homeowner to purchase flood insurance where others did. Some of the predictions with respect to that flooding were apparently incorrect as a result of the alleged failure of the levee system. An insured may reasonably expect overtopping of a levee, but on the other hand an insured may not reasonably expect that levees designed and certified by the United States Corps of Engineers would fail as a result of negligent design and construction as has been alleged.

3. Ensuing Loss Provisions of the Act or Decisions Exclusion Render the Exclusion Inapplicable

The insurers also contend that another exclusion would act to deny coverage to any of the instant policy holders. The policies in the Exclusion Section also provide as follows:

Section 1 – Exclusions

2. We do not insure for loss to property described in Coverages A and B caused by any of the following. **However, any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered.**

. . .

b. **Acts or decisions,** including the failure to act or decide, of any person, group, organization or governmental body;

c. **Faulty, inadequate or defective:**

(1) Planning, zoning, development, surveying, siting;

(2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

(3) Materials used in repair, construction, renovation or remodeling; or

(4) Maintenance;

of part or all of any property whether on or off the "residence premises."

(Standard Fire Policies, App, at INS 97 and INS 137; Hartford Policy, App. at INS 56; Hanover Policy, app, at INS 10; Unitrin Policy, App. at INS 172.). As the Court has found there is coverage for the flood damage as alleged, then the losses would be considered "ensuing" and as such, these exclusions would be inapplicable. *See Lake Charles Harbor & Terminal*

District v. Imperial Cas. & Indem. co., 857 F.2d 286 (5th Cir.1988) (Rubin, J.).

As this Court concerning *Holden v. Connex-Metalna,* 2001 WL 40994 (E.D.La. Jan.16, 2001):

> In *Lake Charles Harbor & Terminal District v. Imperial Casualty and Indemnity Company,* 670 F.Supp. 189 (W.D.La.1987), a cable broke on a shiploader, causing the shuttle portion of the loader to crash into the interior of the loader, resulting in extensive damage. The insurer denied coverage based on a policy exclusion for "[m]echanical or machinery breakdown; unless an insured peril ensues, and then only for the actual loss or damage caused by such ensuing peril." The plaintiff argued that the damage to the shiploader was an excluded peril. *Id.* at 193. It considered the that the purpose of an all risk policy "is to keep the insurer in its proper role as bearer of casualties rather than as warrantor or service contractor of the equipment of the insured. *Id.* at 194. The court held that damages to the ship unloader were covered under the policy, as "[t]he damages to the ship loader were not such as the insured would be expected to bear in the ordinary course of maintenance." *Id.*
>
> On appeal, the United States Court of Appeals for the Fifth Circuit affirmed, finding the policy language to be so ambiguous that its "words, read literally, are meaningless." *Lake Charles Harbor & Terminal District v. Imperial Casualty & Indemnity Co.*, 857 F.2d

> 286 (5th Cir.1988). The insurers asserted that "because a mechanical breakdown was the but for cause of the accident . . . no insured peril ensued." *Id* at 287. The Court of Appeals rejected such an interpretation. Examining the policy language, Judge Rubin found that "[w]hatever ensuing peril may mean, nothing in the policies indicates that catastrophic damages to a machine caused by its own mechanical breakdown cannot be included within the term." *Id.* at 288. Thus, the court interpreted the exclusion to find that "the insurance policies covered all risks except those explicitly excluded from coverage, and excluded coverage for mechanical breakdowns only when "no insured peril ensue[d]." *Id.* at 289.

Id. 2001 WL 40994, at *5-6.

4. Anti-Concurrent Cause Clause is Inapplicable

Finally, the Court finds that the Anti-Concurrent Cause Clause[16] is inapplicable to the ISO water exclusion as there is no "separate" or other cause of

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[16] This term of art is used to refer to the lead-in clause of the ISO policy which states "We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. (Standard Fire Policies, App, at INS 96 and INS 136; Hartford Policy, App. at INS 55; Hanover Policy, app, at INS 9; Unitrin Policy, App. at INS 171.)

damage. The allegations before the Court are not analogous to those which the Mississippi federal courts are facing in *Buente v. Allstate Ins. Co.*, 422 F.Supp.2d 690 (S.D.Miss.2006) and *Tuepker v. State Farm Fire & Cas. Co.*, 2006 WL 1442489 (S.D.Miss. May 24, 2006). This case does not present a combination of forces that caused damage such as wind versus water as was present in the natural disaster which the Mississippi Gulf Coast experienced as a result of Hurricane Katrina. The undefined term "flood" in the Water Damage Exclusion is reasonably interpreted to be limited to flooding caused by natural acts, not those that were man-made. As such, there is no excluded loss as alleged in this Complaint. In this case the "cause" conflates to the flood; it is not wind damage versus water damage both of which were totally naturally occurring incidents as in *Buentes*. But, there may be proof issues which will arise in the context of water damage that may have been caused by water which naturally overtopped levees. The court is not striking the anti-concurrent cause clause, it is simply holding that the term "flood" is ambiguous and that it finds that "flood" in the ISO Water Exclusion context means simply "flood" caused by natural occurrences such as overtopping. As previously noted, the issue of the anti-concurrent cause clause may have to addressed at a later stage of this litigation.

B. State Farm Policy's "Lead-In" Provision

The State Farm policies contain a specific lead-in which removes the ambiguity with regard to causation of flood – that is natural versus man-made. As previously noted, the State Farm policies provide:

> SECTION I – LOSSES NOT INSURED
>
> 2. We do not insure under any coverage for loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss ***regardless of: (a) the cause of the excluded event;*** or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:
>
> c. (1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these all whether driven by wind or not;

(Doc. 570, Exhibit A and B, pp. 7 and 10) (emphasis added).

The State Farm policy does precisely what the ISO Water Exclusion Policy fails to do. It makes it clear that regardless of the **cause** of the flooding, there is no coverage provided for any flooding "regardless of the cause." Such language is clear to the

Court and as such, the Court must find that the State Farm policy as written excludes coverage for all flooding.

In so finding, the Court is aware that it is at odds with the decision in *Murray,* 203 W.Va. at 489-92, 509 S.E.2d 1. In its decision, the *Murray* court focused on the "natural or external forces" of the lead-in clause, and concluded that the lead-in clause operated to defeat the efficient proximate cause doctrine and the insureds' reasonable expectations. The court basically excused a policy holder from a "painstaking review" of the policy. *Id.* at 490, 509 S.E.2d 1. The *Murray* court relied substantially on language contained in certain California cases; however, California has statutorily limited the application of these types of clauses. As noted in David L. Leitner; Reagan W. Simpson; and John M. Bjorkman, 4 Law and Practice of Insurance Coverage Litigation § 52:35:

> Three states, California, Washington, and West Virginia, follow the efficient proximate cause rule and also refuse to enforce at least some anti-concurrent causation policy provision. In addition Wisconsin has found ambiguous and construed in favor of the insured the application of an anti-concurrent causation clause in a general policy form to an additional coverages endorsement. The California courts have concluded that anti-concurrent causation policy provisions are contrast to the statutory mandate in that state's insurance Code. In Washington, the courts simply have refused to enforce anti-concurrent causation

> provisions regardless of their clarity and have provided little rationale for this conclusion. West Virginia's supreme Court has concluded that the anti-concurrent cause language conflicts with the insured's reasonable expectations and therefore, is unenforceable.

Id. Louisiana has not spoken to the issue of whether the doctrine of efficient proximate cause overrides anti-concurrent cause clauses. As noted, Louisiana has adopted the efficient proximate cause approach to coverage; however, the courts have not, to this Court's knowledge, squarely addressed this tension. Nonetheless, from the foregoing citations to the Code and the *jurisprudence constant* concerning clear language and the ability for parties to a contract to dictate the terms thereof, it appears that a Louisiana court would enforce the clear contractual intent to exclude coverage as found in this State Farm lead-in clause.

C. Hartford Policy's specific Flood Definition

Finally, in the *Vanderbrook* context, the efficacy of Hartford's "Amendatory Endorsement Specifically Excepted Perils" must be examined. This two page provision provides in relevant part:

> As used herein, Peril means a cause of physical loss or damage to property. It has this meaning whether or not it is called a Peril or a Cause of Loss in this policy.

Even if any of the terms of this policy might be construed otherwise, the following Perils, as described in Paragraphs A. and B. below, are SPECIFICALLY EXCEPTED FROM THIS POLICY. WE DO NOT COVER INSURE AGAINST LOSS OR DAMAGE DIRECTLY OR INDIRECTLY CAUSED BY, RESULTING FROM, CONTRIBUTED TO OR AGGRAVATED BY, OR WHICH WOULD NOT HAVE OCCURRED BUT FOR, EITHER OF THESE PERILS:

A. ACTS, ERRORS OR OMISSIONS by you or others in:

. . .

3. The design, specifications, workmanship, repair, construction, renovation, remodeling, grading or compaction of all or any part of the following:

b. Roads, water or gas mains, sewers, drainage ditches, levees, dams, or other facilities; . . .

5. The maintenance of any of such property or facilities.

. . .

This exception A. applies whether or not the property or facilities described above are:

1. Covered under this policy; or

2. On or away from the covered premises.

This exception A. does not reduce the insurance for loss or damage caused directly by a Covered Peril.

As used in this endorsement:

1. If this policy is written to cover the risk of loss from specifically named causes, **Covered Peril** means any Peril specifically named as covered;

2. If written to cover the risk of loss without specifying specifically named causes, Covered Peril means any Peril not described above and not otherwise excluded or excepted from the causes of loss covered by this policy.

B. COLLAPSE CRACKING OR SHIFTING of buildings, other structures or facilities, or their parts, if the collapse, cracking or shifting:

1. Occurs during earth movement, volcanic eruption or flood conditions or within 72 hours after they cease; and

2. Would not have occurred but for earth movement, volcanic eruption, or flood.

But if loss or damage by a Covered Peril ensues at the covered premises, we will pay for that ensuing loss or damage.

This exception B. applies whether or not there are other provisions in this policy relating to collapse, cracking or shifting of buildings, other structures or facilities, or their

parts. Any such provision is revised by this endorsement to include this exception.

But if this policy specifically covers (by endorsement or in any other way) loss or damage caused by one or more of the following Perils:

. . .

2. Flood:

this exception B. will not reduce that coverage.

As used in this exception B:

. . .

6. flood means:

a. Flood, surface water, waves, tides, tidal water, tidal waves, high water, and overflow of any body of water, or their spray, all whether driven by wind or not;

b. Release of water held by a dam, levy or dike or by a water or flood control device; . . .

All other provisions of this policy apply.

(Doc. 568, Hartford Policy, App. at INS 74-75). Hartford urges both exceptions A and B as excluding coverage for the flooding as alleged in the *Vanderbrook* petition.

The Court finds that exception A indeed acts as a specific exclusion for flood damage caused by negligently maintained levees. To begin, its "lead-in"

clause leaves nothing to the imagination. It states unequivocally that "[e]ven if any of the terms of this policy might be construed otherwise," the Acts, Errors or Omission of the insured or others are specifically excepted from the policy. It continues, parsing the exclusion, to declare that Hartford specifically excludes loss or damage directly or indirectly caused by acts, errors or omissions by others in the design specifications, workmanship, repair, construction renovation, of levees, dams or other facilities or the maintenance of any such property. Such a clear statement of exclusion from coverage likewise must be enforced.

X. Conclusion

Thus, the Court finds that the ISO exclusions as contained in the Standard Fire Policies, App. at INS 94 and INS 134, the Hartford Policy, App. at INS 53, the Hanover Policy, App. at INS 7 and Unitrin Policy, App. at INS 169 are ambiguous and as such the Court finds that the motion to dismiss based on the Water Exclusion must be denied for each of these insurers except Hartford. However, because of the Amendatory Endorsement Specifically Excepted Perils, Hartford's motion will be granted. Finally, because of the clarity of the State Farm exclusion as to "regardless of cause", that motion will be granted. Accordingly,

IT IS ORDERED that with respect to:

Doc. No. 568 the Motion for Judgment on the Pleadings filed by Hanover Ins. Co. ("Hanover")

insurer of plaintiff James Capella and Madeline Grenier[17] is **DENIED**.

Doc. No. 569 the Motion for Judgment on the Pleadings filed by Standard Fire Ins. Co. ("Standard") insurer of plaintiffs Peter Anthony Ascani, III, Gregory R. Jackson, and Monica Reyes is **DENIED**.

Doc. No. 570 the Motion for Judgment on the Pleadings filed by State Farm Fire & Cas. Co. ("State Farm") insurer of Mary Jane Silva and Robert G. Harvey is **GRANTED**.

Doc. No. 572 the Motion to Dismiss Party filed by Hartford Ins. Co. of the Midwest ("Hartford") insurer of Jack Capella as the Executor of the Succession of Lillian Capella is **GRANTED**.

Doc. No. 598 the Motion for Judgment on the Pleadings filed by Unitrim Preferred Ins. Co. ("Unitrim") insurer of Richard Vanderbrook is **DENIED**.

THIS ORDER PERTAINS TO:

***Xavier University*, C.A. No. 06-516**

ORDER AND REASONS

Plaintiff Xavier University of Louisiana ("Xavier") was insured by Travelers Property Casualty Company of America ("Travelers") under a Commercial Insurance Policy designated as "A Custom Insurance Policy"

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[17] See Footnote 1 above.

(Exhibit A to Opposition, TRAV 383) (hereinafter TRAV) which included "Deluxe Property" coverage (TRAV 389) as part of an all risks policy. Xavier incurred severe property damage some of which was allegedly was caused by water which came from the 17th Street Canal and the London Avenue Canal breaches. Relying on the following provision of the policy, Travelers has denied coverage for the water damage which Xavier experienced:

> Water Damage Exclusion
>
> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that has contributed concurrently or in sequence to the loss.
>
> g. Water
>
> (1) Flood, surface water, waves, tides, tidal waves overflow of any body of water, or their spray, all whether driven by wind or not;
>
> (2) Mudslide or mudflow:
>
> (3) Water under the ground surface pressing on, or flowing or seeping through:
>
> (a) foundations, walls, floors or paved surfaces;
>
> (b) Basements, whether paved or not; or
>
> (c) Doors, windows or other openings.

(TRAV 410). Travelers has filed Plaintiff's Motion for Partial Summary Judgment (Doc. 1217) seeking a ruling that, as a matter of law, damages to Xavier's campus following Hurricane Katrina were caused by ground water which came from the collapses of the 17th Street Canal and the London Avenue Canal levees as a result of man-made causes and that such damages are covered under the "all risks" policy of insurance issued to Xavier by defendant Travelers.

I. Standard for Summary Judgment Motion

This motion has been brought pursuant to Fed.R.Civ.P. 56. Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Substantive law determines the materiality of facts, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] . . . which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the movant meets this burden, the burden shifts to the non-movant "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322, 106 S.Ct. 2548. "[M]ere allegations or denials" will not defeat a well-supported motion for summary judgment. Fed.R.Civ.P. 56(e). Rather, the non-movant must come forward with "specific facts" that establish an issue for trial. *Id.*

When deciding a motion for summary judgment, the Court must avoid a "trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts" are tasks for the trier-of-fact. *Anderson,* 477 U.S. at 255, 106 S.Ct. 2505. To that end, the Court must resolve disputes over material facts in the non-movant's favor. "The party opposing a motion for summary judgment, with evidence competent under Rule 56, is to be believed." *Leonard v. Dixie Well Service & Supply, Inc.,* 828 F.2d 291, 294 (5th Cir.1987).

Based on the analysis contained in the *Vanderbrook* opinion herein, in particular the legal analysis contained in the following subsections:

I. The Civilian Approach as an Erie Court;

IV. Legal Concepts for Contract Interpretation;

VI. Parties' Contentions;

VII. Definitions and Usage of the Word "Flood" Demonstrate Two Reasonable Interpretations of the Term;

VIII. Jurisprudence Further Demonstrates Reasonableness of Alternative Interpretations;

IX. Application of Legal Principles to the Policies Before the Court; and

A. ISO Water Damage Exclusion,

this Court finds that the Water Damage Exclusion as found in Xavier's Travelers policy is ambiguous and as such affords Xavier coverage for damages sought provided that Xavier can prove that the flooding it experienced was caused by the negligence of man. The ISO Water Damage Exclusion and the subject exclusion are practically identical; indeed, with respect to the subsection (1), the wording is identical. The exclusion does not clearly address flooding caused by man-induced causes and as such, the Court must find coverage.

This ambiguity is highlighted by the policy language itself. The Earth Movement Exclusion in the Travelers policy is preceded by the same "lead-in" clause and provides:

> b. Earth Movement
>
> (1) Any earth movement (other than "sinkhole collapse") ***whether natural or man made,*** including but not limited to earthquake, mine subsidence, landslide, or earth sinking, rising or shifting. But if earth movement results in fire, or explosion, we will pay for the loss or damage caused by that fire or explosion.

(TRAV 409). Thus, Travelers demonstrates that is has the ability to clearly exclude man-made earth-movement claims. Its failure to use the same language in the same policy with respect to an exclusion within the same section of the policy gives further support to this Court's decision that the Water Damage Exclusion is limited to natural disasters – not those than man's negligence causes.

However, the Court cannot as a matter of law find that the damages to Xavier's campus following Hurricane Katrina were caused by ground water which came from the collapses of the 17th Street Canal and the London Avenue Canal levees. Obviously, there are questions of fact which preclude the granting of Xavier's motion in that regard. Accordingly,

IT IS ORDERED that Plaintiff's Motion for Partial Summary Judgment (Doc. 1217) is **GRANTED** in part as the Court finds that the Water Damage Exclusion would provide coverage for water damage caused by the negligent acts of mind and **DENIED** in

part as the Court finds there are material questions of fact as to the cause of the water damage to Xavier.

THIS ORDER PERTAINS TO:

***Chehardy*, C.A. No. 06-1672, 06-1673, and 06-1674**

ORDER AND REASONS

Before the Court are the following motions[18]:

Doc. 903 Motion to Dismiss filed by Louisiana Citizens Property Insurance Corp.;

Doc. 923 Motion to Dismiss filed by Encompass Indemnity Company;

Doc. 932 Consolidated Rule 12(B)(6) Motion to Dismiss Plaintiffs' Amended and Restated Complaint filed by Defendants The Standard Fire Insurance Company, Lexington Insurance Company, Liberty Mutual Fire Insurance Company, The American Insurance Company, Aegis Security Insurance Company,

[18] It must be noted that the Amended and Restated Complaint does not specify which plaintiffs are insured by which defendants. The Court has attempted to ascertain this information for purposes of specificity with respect to its ensuing orders herein; however, there is some confusion which prevents the Court from doing so. In addition to which, the information provided is not in the record. However, it has been represented to the Court by counsel that all insurers herein have provided at least one policy to one plaintiff, thus the Court will enter its orders with respect to the insurers and will not be able to identify the specific plaintiff who is effected by such order.

Auto Club Family Insurance Company,[19] the Hanover Insurance Company and Lafayette Insurance Company

Doc. 936 Motion to Dismiss Plaintiffs' Amended and Restated Complaint filed by Great Northern Insurance Company;

Doc. 939 Motion to Dismiss Pursuant to Rule 12(b) filed by Allstate Insurance Company, Allstate Indemnity Company; and

Doc. 1037 Motion to Dismiss Plaintiffs' Amended and restated Complaint filed by State Farm Fire and Casualty Company.

As noted, the Court entertained oral argument on these motions on October 27, 2006 and is now prepared to rule thereon.

I. *Chehardy* Amended and Restated Complaint

Plaintiffs, as putative class representatives, allege that they are residents of the Parishes of Orleans, St. Bernard and Jefferson who sustained damage to their property following Hurricane Katrina. Plaintiffs allege that they purchased homeowners insurance from the insurers named as defendants in this case. (Doc. 516, Amended and Restated Complaint, ¶¶ 26, 27, 44).

---

[19] This company was named as AAA Homeowners Auto Club in the Amended Complaint.

Plaintiffs claim that they suffered water damage resulting from the "catastrophic events" of Hurricane Katrina (*Id.* ¶¶ 41-44) which left "approximately 80% of Orleans Parish . . . under water. . . ." (*Id.* ¶ 45). Plaintiffs allege that, on August 29, 2005, "there was water on both sides of the Industrial Canal in New Orleans" and that "there was six to eight feet of water in the City's Lower Ninth Ward," as a result of a breach in the Industrial Canal levee wall. (*Id.* ¶¶ 41, 42). Plaintiffs further state that "the levees around the City and adjoining parishes failed in at least eight (8) distinct locations, including the 17th Street, London Avenue and Industrial Canals," and that Plaintiffs suffered damage to their property as a result of these events. (*Id.* ¶¶ 43-45).

Plaintiffs allege that the cause of the levee failures was "negligent design, negligent maintenance and/or inadequate materials," and that "any damages attributable to the levee failures are the result of improper and/or negligent design, construction, maintenance of the levees by various third parties and or third party negligence." (*Id.* ¶¶ 46-50). Plaintiffs also assert that high winds and storm surge contributed to levee failures and the resulting water damage to each individual plaintiff's property. (*Id.* at pp. 17-18).

Plaintiffs acknowledge that their policies contain water damage exclusions that ostensibly exclude coverage for "floods" and allege that "the reasonable expectations of Louisiana policyholders is that 'flood' encompasses overflowing of the Mississippi River,

accumulation of surface water due to heavy rainfalls, or similar phenomena but not the failing of virtually all manmade structures containing navigable Waters of the United States . . . due to negligent conduct beyond" beyond plaintiffs' control. (*Id.* ¶ 61) Plaintiffs contend that these water exclusions should not be given such a broad reading so as to disallow coverage under the circumstances alleged in the Amended and Restated Complain. (*Id.* ¶ 60). They maintain that Plaintiffs' "reasonable expectation" was that their homeowners policies would provide coverage for the type of flooding that occurred after Hurricane Katrina. (*Id.*)

The Complaint alleges five counts. Count I seeks a five-part declaratory judgment from this Court. (*Id.* ¶ 58) Specifically, Plaintiffs seek a declaratory judgment that:

> (1) "The first efficient proximate cause of the losses . . . was '**windstorm**,' a covered peril . . . thereby rendering any subsequent ***impact from water*** released by the levee and/or levee wall failures irrelevant to coverage";
>
> (2) "The second efficient proximate cause of the losses ***resulting from water entering the City of New Orleans*** and adjoining parishes . . . were acts of **negligence**";
>
> (3) "The third efficient proximate cause of the losses ***resulting from water entering the City of New Orleans*** and adjoining parishes . . . was **storm surge**, a known

> meteorological phenomenon that is not specifically excluded" by the Policies;
>
> (4) "The ***breaking or failure of boundaries of*** lakes, reservoirs, rivers, streams, or other ***bodies of water*** was a peril not specifically excluded" by the Policies;
>
> (5) "The ***damage caused by water*** entering the City of New Orleans and adjoining parishes . . . due to the breaches in the levees and levee walls along the 17th Street Canal, London Avenue Canal, Industrial Canal, and elsewhere neither falls within the regular definition of 'flood,' nor within any of the subject insurance policies' exclusions of 'flood.'"

(*Id.* at pp. 17-18 (emphasis added)).

Count II alleges a breach of contract claim based on the Moving Defendants' failure to pay for water damage caused by flooding allegedly resulting from the "efficient proximate cause of windstorms, storm surge and/or negligence." (*Id.* ¶ 68)

Finally, Plaintiffs also assert extra-contractual claims based on the Moving Defendants' alleged improper denial of Plaintiffs' water damage claims. These claims are based on allegations that the Moving Defendants: (1) wrongfully denied coverage by "equating" losses caused by wind, negligence and storm surge "with flood" (Count 3); (2) "misrepresented" that the policies' Water Damage Exclusion applied to Plaintiffs' claims "without a legitimate basis" for doing so (Count IV); and (3) directed their

adjusters to "consider only nearby waterlines and to ignore all other evidence in determining whether Policyholders' losses are covered . . . " in violation of La. R.S. 22:658.2(A)(1) (Count V). (*Id.* ¶¶ 85, 87-88, and 90; *Id.* ¶¶ 73-74 and 76-77) La. R.S. 22:658.2(A)(1), which became effective on February 23, 2006, provides that "[n]o insurer shall use the floodwater mark on a covered structure without considering other evidence, when determining whether a loss is covered or not covered under a homeowners' insurance policy."

II. Motions Filed

Based on substantially the same arguments set forth in the *Vanderbrook* matter, each of the named insureds has filed, either jointly or individually, depending on the language of their respective policies, the Motions to Dismiss noted above. In approaching these arguments, the Court re-urges and adopts herein Section I of the *Vanderbrook* opinion – that is "I. The Civilian Approach as an Erie Court" and "III. Standard for Judgment on the Pleadings." Furthermore, the Court will not address any arguments made with respect to the extra-contractual claims brought by plaintiffs. The Court intends to resolve the insurance coverage issues addressed in these consolidated cases and certify the matter to the United States Court of Appeals for the Fifth Circuit. It would be premature and a distraction to approach the extra-contractual issues at this juncture. Thus, the motions in this respect will be denied without prejudice to be re-urged at the appropriate time.

The Court will now examine each motion filed, not in numerical order, but in order of scope.

III. Policy Language and the Motions to Dismiss

A. Insurers Using ISO Policy Language – Motion to Dismiss Doc. No. 932

The policies issued by The Standard Fire Insurance Company, Lexington Insurance Company, Liberty Mutual Fire Insurance Company, The American Insurance Company, Aegis Security Insurance Company, Auto Club Family Insurance Company and the Hanover Insurance Company and Lafayette Insurance Company (hereafter "ISO defendants") are identical but for one exception. The Auto Club Family Insurance Company policy issued to Randy and Lori Gervais (INS 88 THROUGH INS 000121) does not contain the "weather conditions" and "faulty, inadequate or defective; design and maintenance exclusions, so the arguments made in that respect are not applicable to them. The Court will address the subject motion in relation to the policy provisions upon which these ISO defendants rely.

1. Water Damage Exclusion

The ISO water damage exclusion provides:

> (1) We do not insure for loss **caused directly or indirectly by any of the following**. Such loss is excluded regardless of any

> other cause or event contributing concurrently or in any sequence to the loss.
>
> **(c) Water Damage**, meaning:
>
> Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

(Doc. 932 Appendix of Moving Defendants at INS 11, INS71, INS 110, INS 155, INS 199, INS 357, INS 406 AND INS 458.) Based on this language, the ISO defendants maintain that there is no coverage. For the same reasons assigned in the *Vanderbrook* opinion above, in particular, IV. Legal Concepts for Contract Interpretation;

> VI. Parties' Contentions;
>
> VII. Definitions and Usage of the Word "Flood" Demonstrate Two Reasonable Interpretations of the Term;
>
> VIII. Jurisprudence Further Demonstrates Reasonableness of Alternative Interpretations;
>
> IX. Application of Legal Principles to the Policies Before the Court; and
>
> A. ISO Water Damage Exclusion,
>
> the Court reiterates and adopts those findings and reasoning and finds this exclusion ambiguous and as such, interprets the provision in favor of the insured. Thus, the Motion to Dismiss with respect to the Water Damage Exclusion will be denied.

2. Weather Conditions Exclusion

The ISO defendants then urge that the Weather Conditions Exclusion reinforces the legal inadequacy of the plaintiffs' theory. That clause provides:

> We do not insure for loss to property described in Coverage A and B caused by any of the following . . .
>
> **a. Weather conditions.** However, this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in paragraph 1. above [which includes the Water Damage Exclusion] to produce the loss.

(INS 0011, INS 0071, INS 00110, INS 00155, INS 00199, INS 00318, 8NS 358, INS 00406, and INS 00458). As the Court finds that the Water Damage Exclusion does not exclude coverage for water damage caused by the negligent or intentional acts of man, this provision is without force in this instance by its own terms, and the motion must be denied in this respect.

3. Negligent Design, Construction or Maintenance

The ISO defendants also urge the following language should prevent coverage from attaching:

> Section 1 – Exclusions
>
> 2. We do not insure for loss to property described in Coverages A and B caused by any

of the following. **However, any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered.**

. . .

b. **Acts or decisions,** including the failure to act or decide, of any person, group, organization or governmental body;

c. **Faulty, inadequate or defective:**

(1) Planning, zoning, development, surveying, siting;

(2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

(3) Materials used in repair, construction, renovation or remodeling; or

(4) Maintenance; of part or all of any property whether on or off the "residence premises."

(INS 0011, INS 0071, INS, 00110, INS 00155, INS 00197, INS 00318, INS 00358, INS 00406, and INS 00458) (emphasis added). As there is an ensuing loss provision in this section, again for the specific reasons stated above in Section IX.A.3. of the *Vanderbrook* opinion, the Court rejects this argument and will deny the motion.

4. Plaintiffs' Extra-Contractual Claims Fail As a Matter of Law

As stated above, the Court finds the relief sought by defendants to be premature, and the motion will be denied without prejudice for these arguments to be re-urged at the appropriate time.

Thus, the Motion to Dismiss (Doc. 932) filed by the ISO defendants will be denied.

B. Allstate Insurance Company and Allstate Indemnity Co.'s Motion to Dismiss (Doc. 939)[20]

The Court will now examine the policy language of the Allstate policies in light of its Motion to Dismiss.

1. Water Damage Exclusion

Allstate relies on the following policy language to exclude coverage for the relevant plaintiffs.

Losses We Do Not Cover Under Coverages A and B:

---

[20] Allstate filed a Motion for Judgment on the Pleadings in October 31, 2005, prior to this matter being transferred from the United States District Court for the Middle District of Louisiana to this Court and in reference to the Original Petition and First Supplemental and Amending Petition. Considering the filing of the Amended and Restated Complaint filed in this Court on June 2, 2006, that motion is **DENIED** as **MOOT**.

> We do not cover loss to the property described in Coverage A – Dwelling Protection or Coverage B – Other Structures Protection consisting of or caused by:
>
> 1. Flood, including, but not limited to surface water, waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind.
>
> 2. Water or any other substance that backs up through sewers or drains.
>
> 3. Water or any other substance that overflows from a sump pump, sump pump well or other system designed for the removal of subsurface water which is drained from a foundation area of a structure.
>
> 4. Water or any other substance on or below the surface of the ground, regardless of its source. This includes water or any other substance which exerts pressure on, or flows, seeps or leaks through any part of the residence premises.

(Exhibit A to Motion, ALST 00230-00231). With respect to Section 1 above, for all of the reasons stated heretofore in the *Vanderbrook* opinion above, in particular, IV. Legal Concepts for Contract Interpretation;

> VI. Parties' Contentions;
>
> VII. Definitions and Usage of the Word "Flood" Demonstrate Two Reasonable Interpretations of the Term;

VIII. Jurisprudence Further Demonstrates Reasonableness of Alternative Interpretations;

IX. Application of Legal Principles to the Policies Before the Court; and

A. ISO Water Damage Exclusion,

the Court again finds this exclusion ambiguous and as such, interprets the provision in favor of the insured. As such, the Motion to Dismiss with respect to the Water Damage Exclusion will be denied.

Likewise Losses Not Covered Sections 2, 3 and 4 above do not exclude with specificity damages caused by water the presence of which was caused by the negligent or intentional acts of man which is the gravamen of plaintiffs' claims. Obviously, in the event that there is proof adduced with respect to an individual claim that the actual cause of the damage to that individual home was actually caused by the types of occurrences described in these exclusions, then a finder of fact could find these exclusions to be operative. However, in the context of a Motion to Dismiss, this Court cannot and will not find as a matter of law find that these exclusions are not ambiguous and clearly exclude coverage for damage allegedly caused by the failed levee system caused by the negligent or intentional acts of man.

With respect to Section 4, from the case law examined concerning this particular exclusion, it does not appear that this exclusion is meant to address

water damage caused by negligence of the kind alleged in *Chehardy. See West v. Umialik Ins. Co.,* 8 P.3d 1135 (Alaska 2000); *Hudson v. Allstate Ins. Co.,* 25 A.D.3d 654, 809 N.Y.S.2d 124 (2nd Dept. 2006); *Carver v. Allstate Ins. Co.,* 77 Ark.App. 296, 76 S.W.3d 901 (2002). Furthermore, the term "no matter the source" does not address causation, rather it addresses the a location from where the water might emanate. As such and again for all of the reasons stated in *Vanderbrook,* the motion in this respect will be denied.

2. Planning, Construction or Maintenance

Allstate further relies on the following language which is in the same section noted above, that is the "Losses We Dot Not Cover Under Coverages A and B" which provides that it does not cover losses caused by:

> 22. Planning, Construction or Maintenance, meaning faulty, inadequate or defective:
>
> (a) planning, zoning, development, surveying, siting;
>
> (b) design, specifications, workmanship, repair construction, renovation, remodeling, grading, compaction;
>
> (c) material used in repair, construction, renovation or remodeling; or
>
> (d) maintenance;

> of property whether on or off the residence premises by any person or organization.

(Exhibit A to Motion, ALST 00232). Again, this exclusion does not clearly exclude man-made failures with respect to levees which is at the core of the *Chehardy* pleading. Although the Allstate provision does not have an ensuing loss provision like the one contained in the ISO policy, this exclusion would appear to apply only to defalcations which occur whether on or off the residence premises with respect to the construction or design, and the like, of the insured premises or for property insured but not on the insured premises. Therefore, the omission of the ensuing loss provision is irrelevant to the facts as plead herein. *See e.g. Holland v. Breaux,* 2005 WL 3542899 (E.D.La. Nov. 22, 2005) (Africk, J.); *Angott v. Great Northern Ins. Co.,* 2006 WL 1328874 (E.D.Mich. May 15, 2006); *Wright v. Safeco Ins. Co. of America,* 123 Wash.App. 1021, 2004 WL 2095664 (Wash.App. Div. 1, Sept. 20, 2004). Again for all of the reasons cited with respect to what is required for an exclusion to an all-risk policy to be unambiguous and enforceable found in *Vanderbrook,* this exclusion fails.

3. Storm Surge in Section 1 of Exclusion for Flood

Allstate also reiterates the language contained in Section 1[21] of the losses not covered and cites to *Tuepker v. State Farm,* 2006 WL 1442489 (S.D.Miss. May 24, 2006) to urge that because "storm surge" was clearly excluded, there should be no coverage. This case is inapposite to the one before the Court because in *Tuepker,* naturally occurring storm surge was the cause of loss along the Mississippi Gulf Coast. There was no levee failure involved; this argument is irrelevant to the *Chehardy* allegations.

4. Weather Conditions

Allstate also relies on Exclusion Section 21 which provides that Allstate does not cover loss to the insured property caused by "weather conditions that contribute in any way with a cause of loss excluded in this section to produce a loss." (Exhibit A, ALST 00232). Again, as the Court has found that the Water Damage Exclusions are inapplicable, this exclusion has no effect as the loss is not excluded by the "Losses We Do Not Cover" provisions.

---

[21] "Flood, including, but not limited to surface water, waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind"

5. Hurricane Deductible Endorsement

Allstate argues in its opposition to the *Chehardy* motion, "Plaintiffs also have argued that their homeowner policy covers flood damage because of a Hurricane Deductible Endorsement." While this allegation in the *Chehardy* pleadings alludes the Court, the Court concurs that any Hurricane Deductible Endorsement contained in a policy does not increase coverage provided to a homeowner or insured. Rather it generally increases the applicable deductible for covered losses caused by a hurricane. As such, the Court finds that such an endorsement does not increase the coverage conferred by the policy in question.

6. Plaintiffs' Extra-Contractual Claims Fail As a Matter of Law

As stated above, the Court finds the relief sought by Allstate to be premature considering the posture of the case, and the motion will be denied without prejudice for it to be re-urged at the appropriate time.

Thus, Allstate Insurance Company and Allstate Indemnity Co.'s Motion to Dismiss (Doc. 939) will be denied.

C. State Farm's Motion to Dismiss (Doc. 1037)

State Farm moves for the dismissal of Count One of the Complaint for Declaratory Relief and Count

Two for Breach of Contract based on the same exclusions previously discussed in the *Vanderbrook* opinion.

The State Farm policies provide that "We insure for accidental direct physical loss to the property described in Coverage A, except as provided in SECTION I – LOSSES NOT INSURED." The policies then provides:

> SECTION I – LOSSES INSURED
>
> Coverage A – Dwelling
>
> We insure for accidental direct physical loss to the property described in Coverage A, except as provided in Section I – LOSSES NO INSURED.
>
> SECTION I – LOSSES NOT INSURED
>
> 2. We do not insure under any coverage for loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss ***regardless of: (a) the cause of the excluded event;*** or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:
>
> c. (1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from

> any of these all whether driven by wind or not;

(Doc. 570, Exhibit A and B, pp. 7 and 10) (emphasis added).

For the reasons previously assigned in *Vanderbrook*, in particular Sections:

> IV. Legal Concepts for Contract Interpretation;
>
> VI. Parties' Contentions;
>
> VII. Definitions and Usage of the Word "Flood" Demonstrate Two Reasonable Interpretations of the Term;
>
> VIII. Jurisprudence Further Demonstrates Reasonableness of Alternative Interpretations;
>
> IX. Application of Legal Principles to the Policies Before the Court; and
>
> A. ISO Water Damage Exclusion and
>
> B. State Farm Policy's "lead-In Provision,

State Farm's Motion to Dismiss (Doc. 1037) will be granted and Counts One and Two of the *Chehardy* Amended and Restated Complaint will be dismissed as to State Farm. This provision clearly excludes flood damage "no matter the cause" which clearly includes both natural and man-made "causes." As previously stated, the Court will not address the extra-contractual relief sought at this time, and the

motion will be denied in that respect without prejudice, to be re-urged at the appropriate time.

D. Louisiana Citizens Property Insurance Corp. – Motion to Dismiss Doc. 903

Louisiana Citizens Property Insurance Corporation ("LCPIC") filed a motion which adopts the memoranda filed by the ISO defendants, State Farm and Allstate. This defendant did not explain or provide the Court with which provisions of its own policy upon which it relies in order to ride on these memoranda's coattails. From a review of the insurance policy, it appears that it tracks the language of the ISO defendants' policy – in particular the Water Damage Exclusions, the Weather Condition Exclusion and the Faulty, Inadequate or Defective Acts Exclusion. As such, for the reasons stated in *Vanderbrook* and the reasons reiterated above with respect to the ISO defendants' policy, LCPIC's Motion to Dismiss (Doc. 903) will be denied.

E. Encompass Indemnity Company's Motion to Dismiss (Doc. 923)

Encompass Indemnity Company ("Encompass") filed its Motion to Dismiss and Incorporated Memorandum and adopted (1) Allstate's arguments, (2) the ISO defendants' arguments as well (3) State Farms' arguments. In its memorandum, this defendant does not specify what language within the Encompass policy upon which it relies in this instance. It would

appear that the policy tracks the Allstate policy in some regards as well as the ISO defendants' policies. As best as this Court can ascertain, Encompass relies on the following language:

1. Water Damage Exclusion

In a section entitled "LOSSES WE DO NOT COVER" at ALST 00176 of Exhibit A to the subject motion it states:

> We do not insure for loss caused directly or indirectly by any of the following. such loss is excluded regardless of any other cause or event contributing concurrently or n any sequence to the loss.
>
> **1. Real Property and Tangible Personal Property.** We do not insure for loss:
>
> a. caused by water damage, meaning:
>
> 1. Flood, including, but not limited to surface water, waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind;
>
> 2. Water which backs up through sewers or drains;
>
> 3. Water below the surface of the ground including water which exerts pressure on, or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure; or

> 4. Water emanating from a sump pump, sump pump well or similar device designed to prevent overflow, seepage or leakage of subsurface water.
>
> Direct loss by fire explosion or theft resulting from water damage is covered.

ALST 00177. This water exclusion has neither the lead-in language of State Farm's policy nor the same wording as that of the Allstate policy. It is most like the ISO policy and for all the reasons stated in the foregoing *Vanderbrook* and the *Chehardy* opinion to this point, the Court will deny the motion to dismiss as it pertains to the applicability of the Water Damage Exclusion. Only Section 1 would be arguably applicable by operation of the facts in the instant matter, and the reasons given for the denial of the ISO provisions with respect to the Water Damage Exclusion operate equally in this instance.

2. Other Exclusions

The other provisions that would apparently mirror the arguments made in the other briefs noted are found at Section 2. of the LOSSES WE DO NOT COVER portion of the policy which states:

> 2. Real Property. We do not insure for loss:
>
> . . .
>
> g. To covered real property caused by any of the following. ***However, any ensuing loss***

> ***not excluded or excepted in this policy is covered.***
>
> (1) Weather conditions. However, this exclusion applies only if weather conditions contribute in any way with a cause on (sic) event otherwise excluded to produce the loss.
>
> (2) Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.
>
> (3) Faulty, inadequate or defective:
>
> (a) Planning, zoning, development, surveying, siting;
>
> (b) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
>
> (c) materials used in repair, construction, renovation or remodeling; or
>
> (d) Maintenance; of part or all of any property whether on or off your residence premises.

(ALST 00178-79) (emphasis added). Considering the ensuing loss provision above, the Court likewise for all of the reasons stated previously finds that these exclusions do not operate to exclude coverage for the damages sought in *Chehardy* with respect to losses from water damage.

Again, the Court will deny the motion insofar as it seeks any dismissal of any extra-contractual issues as premature. Thus, the Encompass Indemnity

Company's Motion to Dismiss (Doc. 923) will be denied.

F. Great Northern Insurance Company's Motion to Dismiss (Doc. 936)

Great Northern adopted the Motion to Dismiss of Allstate and relies on the following specific policy language contained in its policy as concerns its argument with respect to the Water Damage Exclusion:

EXCLUSIONS

> These exclusion apply to your Deluxe House Coverage, including the Extra Coverages, unless stated otherwise.
>
> The words "caused by" mean any loss that is contributed to, made worse by, or in any way results from that peril.
>
> . . .
>
> **Surface water.** We do not cover any loss caused by:
>
> - flood, surface water, waves, tidal water, or water borne material from any of these;
> - overflow of water or water borne material from a body of water;
> - run off of water or water borne material from a paved surface, driveway, walkway, patio, or other similar surface; or
> - spray from any of these,

> from any source, even if driven by wind. But we do insure ensuing covered loss unless another exclusion applies.

(Exhibit A, CH-FOR-020 and Exhibit B CH-BAR-018.) This exclusion again does not clearly exclude water damage caused by negligent or intentional acts of man. It does not address the ambiguity of the term "flood" and the fact that all of the listed "causes" appear to be the result of natural occurrences, not the monumental civil engineering debacle that is alleged by plaintiffs. For the reasons assigned in *Vanderbrook* and in the previous sections dealing with ISO and Allstate's motions in *Chehardy,* the Court finds that the Motion to Dismiss based on this exclusion is without merit.

As to the Faulty Planning, Construction or Maintenance, the following language appears in the same Exclusion section as above:

> These exclusion apply to your Deluxe House Coverage, including the Extra Coverages, unless stated otherwise.
>
> The words "caused by" mean any loss that is contributed to, made worse by, or in any way results from that peril.
>
> . . .
>
> **Faulty planning, construction or maintenance.** We do not cover any loss caused by the faulty acts, errors or omissions of you or any other person in planning, construction or maintenance. It does not matter whether the

> faulty acts, errors or omissions take place on or off the insured property. ***But we do insure ensuing covered loss unless another exclusion applies.*** "Planning" includes zoning, placing, surveying, designing, compacting, setting specifications, developing property and establishing building codes or construction standards. "Construction" includes materials, workmanship, and parts or equipment used for construction or repair.

(Exhibit A, CH-FOR-021 and Exhibit B CH-BAR-019.) (emphasis added). Again, for all the reasons previously assigned in *Vanderbrook* and *Chehardy* with respect to this exclusion, as the damage would be considered loss from a covered peril based on the previous analysis, this provision does not operate to deny the insureds coverage.

Likewise, all other arguments raised as to "windstorm," "storm surge" and the applicability of the anti-concurrent clause are likewise rejected for the reasons stated heretofore in *Vanderbrook*. Finally, as noted, the Court will deny the motion insofar as it seeks the dismissal of the extra-contractual claims. The Court will deny that portion of the Motion to Dismiss without prejudice for it to be re-urged at the appropriate time. Thus, the Great Northern Insurance Company's Motion to Dismiss (Doc. 936) will be denied. Accordingly,

IT IS ORDERED with respect to:

Doc. 903 the Motion to Dismiss filed by Louisiana Citizens Property Insurance Corp. is **DENIED**.

Doc. 923 the Motion to Dismiss filed by Encompass Indemnity Company is **DENIED**.

Doc. 932 Consolidated Rule 12(B)(6) Motion to Dismiss Plaintiffs' Amended and Restated Complaint filed by Defendants The Standard Fire Insurance Company, Lexington Insurance Company, Liberty Mutual Fire Insurance Company, The American Insurance Company, Aegis Security Insurance Company, Auto Club Family Insurance Company,[22] the Hanover Insurance Company and Lafayette Insurance Company is **DENIED**.

Doc. 936 Motion to Dismiss Plaintiff's Amended and Restated Complaint filed by Great Northern Insurance Company is **DENIED**.

Doc. 939 Motion to Dismiss Pursuant to Rule 12(b) filed by Allstate Insurance Company, Allstate Indemnity Company is **DENIED**.

Doc. 1037 Motion to Dismiss Plaintiffs' Amended and restated Complaint filed by State Farm Fire and Casualty Company is **GRANTED with respect to coverage and DENIED in part**, that is with respect to the extra-contractual claims of plaintiffs.

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[22] This company was named as AAA Homeowners Auto Club in the Amended Complaint.

ORDER AND REASONS

Kelly A. Humphreys ("Humphreys") filed a Motion for Partial Summary Judgment seeking coverage for wind and flood damages caused by Hurricane Katrina. (Doc. 39). Having held oral argument on this matter on October 27, 2006, and having reviewed the pleadings, exhibits, memoranda and the relevant law, the Court will rule in conformity with the prior decisions rendered herein in the *In re Katrina Canal Breaches Consolidated Litigation* with respect to *Vanderbrook, Xavier and Chehardy.* The Court adopts and considers this motion in conformity with Section I of the *Vanderbrook* opinion entitled "The Civilian Approach as an *Erie* Court" and Section I of the *Xavier* opinion entitled "Standard for Summary Judgment Motion." The Court will first review the pleadings herein.

I. Procedural History and Allegations of Petition

The petition was initially filed in Civil District Court for Parish of Orleans and after the Orleans Levee District was added, the suit was removed to the United States District Court for the Eastern District of Louisiana on January 13, 2006. It was eventually transferred to this section of Court, where the Court granted a Motion to Sever the Orleans Levee District from this matter and remanded that party to state court leaving only Encompass as a litigant.

Plaintiff alleges that her property suffered damage as a result of the 17th Street Canal levee breach. (Petition at IX-XI.) Plaintiff purchased from Encompass a homeowner's policy of insurance in which the summary notes that plaintiff paid an additional $409.00 for "Hurricane Peril Coverage." The declaration sheet notes a $1000.00 "Hurricane Deductible." Plaintiff sought damages under this policy for water damage, wind damage, bad faith claims, including but not limited to her claims under La. R.S. 22:658 and 22:1220. Humphreys also had purchased National flood Insurance Program ("NFIP") coverage from which she collected and is not the subject of suit. On June 12, 2006, a Rule 41 Stipulation of Partial Dismissal was filed notifying the Court that all of plaintiff's wind damage claims and her bad faith claims, including but not limited to her claims under La. R.S. 22:658 and 22:1220 had been compromised. Thus, the only issue remaining is whether her homeowners policy provides coverage for the water damage which she experienced as the result of the collapse of the 17th Street Canal floodwall.

II. The Motion Before the Court

The thrust of plaintiff's motion focuses on the Hurricane Deductible Endorsement which she maintains takes precedence over policy language pursuant to La.Rev.Stat. 22:654 and the declaration sheet which states "Hurricane Coverage Peril." Plaintiff maintains that:

1. By virtue of the Hurricane Peril Coverage/Hurricane Deductible endorsement," a hurricane is covered event.

2. Flood and wind is characteristic of a hurricane storm event;

3. Plaintiff has coverage for "windstorm," so why then did she purchase hurricane protection coverage; and

4. Section 2 **Real Property** subsection g and g.(1) excludes weather conditions but states "ensuing loss," not excluded or exempted by tin the policy is covered.

As such, plaintiff contends that the ensuing loss, damage caused by Windstorm and Hurricane Peril Coverage and Hurricane Deductible Endorsement are ensuing losses that extended coverage by virtue of the endorsements to provide coverage for otherwise excluded perils, i.e. wind and flood waters caused by a hurricane. In addition, plaintiff contends that these provisions create an ambiguity of the type noted in *Tuepker, supra,* and as such, a finding of coverage should ensue.

At oral argument, counsel for plaintiff also adopted the arguments of other counsel concerning the applicability of the Water Damage Exclusion.

III. Applicable Policy Provisions

The policy states in relevant part the following:

COVERAGES

$1000 Hurricane Deductible (based on the residence value)

B. HURRICANE DEDUCTIBLE ENDORSEMENT

We will pay only that part of the total of the loss for all Property Coverages that exceeds the hurricane deducible state on the Coverage Summary. The hurricane deductible shown on the Coverage Summary applies to all covered property for direct physical loss or damage caused directly or indirectly by a hurricane as defined below. Such deductible applies regardless of any other cause or event contributing concurrently or in any sequence to the loss. No other deducible provision in the policy applies to direct physical loss caused by a hurricane. In no event will the deductible applied for a hurricane loss be less than the property deductible shown on the Coverage Summary.

Hurricane means wind, wind gust, hail, rain, tornado, cyclone or hurricane which result in direct physical loss or damage to property be a storm system that has been declared to be hurricane by the National Weather Service. the duration of the hurricane includes the time period in your state:

A. beginning at the time a hurricane watch or hurricane warning is issued for any part of the state by the National Weather Service;

B. continuing for the time period during which the hurricane conditions exist anywhere in the state; and

C. ending 12 hours following the termination of the last hurricane watch or hurricane warning for any part of your state by the National Weather service.

All other provisions of this policy apply.

REAL PROPERTY – COVERED PERILS

We cover direct physical loss to property describe in **Real Property – Insuring Agreement,** unless the loss is not covered under **Property Coverage – Losses We Do Not Cover.**

. . .

LOSSES WE DO NOT COVER

The introductory paragraph is deleted and replaced by the following:

We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. **However, coverage will be provided for any covered peril that precedes an excluded peril, occurs concurrently with an excluded peril, or occurs as a result of an excluded peril.**

(Exhibit "1E" amendment of G18733-H Required Coverage and amendments page 6 of 14.) **1. Real property and Tangible Personal Property.** We do not insure for loss:

> a. Caused by water damage, meaning:
>
> (1) Flood, surface water, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

(Exhibit "1F" policy of Insurances page 11 of 23). **1. Real Property.** We do not insure for loss:

> g. To covered real property caused by any of the following. However, any ensuing loss not excluded or excepted in this policy is covered.
>
> (1) Weather conditions. However, this exclusion applies only if weather conditions contribute in any way with a cause on (sic) event otherwise excluded t produce the loss.

(Exhibit 1G, Page 13 of 23 of policy).

III. Analysis

Plaintiff's contentions concerning the Hurricane Deductible are misplaced. This endorsement simply reduced the deductible that would normally be applicable from a percentage of the value of the house to a flat $1000.00. It does not create independent coverage. However, because of the ambiguity in the Water Damage Exclusion as previously discussed in *Vanderbrook, Xavier and Chehardy,* the Court finds it will grant the motion for partial summary judgment as

the Water Damage Exclusion is ambiguous and must be construed against the insurer, and thus provides coverage for the insured herein. In so finding the Court reiterates and incorporates the *Vanderbrook* opinion above, in particular sections,

> IV. Legal Concepts for Contract Interpretation;
>
> VI. Parties' Contentions;
>
> VII. Definitions and Usage of the Word "Flood" Demonstrate Two Reasonable Interpretations of the Term;
>
> VIII. Jurisprudence Further Demonstrates Reasonableness of Alternative Interpretations;
>
> IX. Application of Legal Principles to the Policies Before the Court; and
>
> A. ISO Water Damage Exclusion.

Accordingly,

IT IS ORDERED that the Plaintiff's Motion for Partial Summary Judgment is **GRANTED** insofar as there is coverage as a result of the ambiguity in the Water Damage Exclusion and **DENIED** with respect to the Hurricane Deductible argument.

CERTIFICATION FOR APPEAL

Pursuant to 28 U.S.C. § 1292(b), all orders entered herein involve a controlling question of law as to which there is a substantial ground for a difference

of opinion and an immediate appeal from these orders may materially advance the ultimate termination of the litigation. In accordance with 28 U.S.C. § 1292(b), an application for appeal must be made to the Court of Appeals within ten days after the entry of this order.

The Court notes that if it had the power under Rule XII of the Rules of the Louisiana Supreme Court to certify the issues decided herein to that court, it would have done so, since there are no clear controlling precedents of the Louisiana Supreme Court on same and the issues presented and decided herein are significant and require an application of Louisiana law.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-30119

(Filed Aug. 27, 2007)

IN RE: KATRINA CANAL BREACHES LITIGATION

RICHARD VANDERBROOK; MARY JANE SILVA; JAMES CAPELLA; MADELINE GRENIER, misidentified as Sophia Granier; JACK CAPELLA, as the Executor of the succession of Lilian Capella; GREGORY JACKSON; PETER ASCANI, III; ROBERT G HARVEY, SR

Plaintiffs-Appellees-Cross-Appellants

v.

UNITRIN PREFERRED INSURANCE COMPANY; HANOVER INSURANCE COMPANY; STANDARD FIRE INSURANCE COMPANY

Defendants-Appellants

STATE FARM FIRE AND CASUALTY COMPANY

Defendant-Cross-Appellee

KELLY A HUMPHREYS

Plaintiff-Appellee-Cross-Appellant

v.

ENCOMPASS INDEMNITY COMPANY

Defendant-Appellant-Cross-Appellee

XAVIER UNIVERSITY OF LOUISIANA

Plaintiff-Appellee

v.

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA

Defendant-Appellant

GLADYS CHEHARDY; DANIEL FONTANEZ; JACQUELYN FONTANEZ; LARRY FORSTER; GLENDY FORSTER; ET AL

Plaintiffs-Appellees-Cross-Appellants

v.

ALLSTATE INDEMNITY COMPANY; ALLSTATE INSURANCE COMPANY; AMERICAN INSURANCE COMPANY; AEGIS SECURITY INSURANCE COMPANY; LAFAYETTE INSURANCE COMPANY; LIBERTY MUTUAL FIRE INSURANCE COMPANY; AAA HOMEOWNERS AUTO CLUB FAMILY INSURANCE COMPANY; LOUISIANA CITIZENS PROPERTY INSURANCE CORPORATION; LEXINGTON INSURANCE COMPANY; ENCOMPASS

INSURANCE COMPANY OF AMERICA; GREAT NORTHERN INSURANCE COMPANY; HANOVER INSURANCE COMPANY; STANDARD FIRE INSURANCE COMPANY

Defendants-Appellants

STATE FARM FIRE AND CASUALTY COMPANY

Defendant-Cross-Appellee

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITIONS FOR REHEARING EN BANC

(Opinion 08/02/07, 5 Cir., ___, ___ F.3d ___)

Before KING, DeMOSS and OWEN, Circuit Judges.

PER CURIAM:

(X) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

( ) Treating the Petitions are Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. The court having been polled at the request of one of the members of the

court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
United States Circuit Judge

Judges Wiener, Dennis, and Clement did not participate in the consideration of the rehearing en banc.

JOSEPH SHER	* NO. 2007-CA-0757
VERSUS	* **COURT OF APPEAL**
LAFAYETTE INSURANCE COMPANY; UNITED FIRE & CASUALTY COMPANY; THE UNITED FIRE GROUP; ROBERT JONES; WES SWANK; FRED VANDERBROOK; AND PROPERTY LOSS CONSULTING, INC.	* **FOURTH CIRCUIT** * **STATE OF LOUISIANA**

* * * * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2006-9276, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge

* * * * * *

Judge Terri F. Love

* * * * * *

(Court composed of Judge Patricia Rivet Murray, Judge James F. McKay, III, Judge Terri F. Love, Judge Max N. Tobias, Jr., and Judge Leon A. Cannizzaro)

MURRAY, J., CONCURS IN THE RESULT

TOBIAS, J., CONCURS IN THE RESULT AND ASSIGNS REASONS. CANNIZZARO, J., CONCURS IN PART AND DISSENTS IN PART

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November 19, 2007

This appeal arises from an insurance claim resulting from damages related to Hurricane Katrina. Joseph Sher, the owner of a five-unit apartment building in New Orleans, contested the claim determination of his commercial insurer, Lafayette Insurance Company. Lafayette Insurance Company refused to pay additional funds asserting that Joseph Sher's property was not properly maintained and that the policy did not cover flood damages. The trial court held that the insurance policy was ambiguous and therefore covered flood damage. A jury determined Joseph Sher's damage awards and the trial court awarded attorney's fees and costs.

Lafayette asserts that the insurance policy is not ambiguous and that the damage awards are excessive. Joseph Sher alleges the trial court erred by not allowing evidence and jury charges relating to his alleged mental anguish. We find the insurance policy ambiguous and affirm the trial court's granting of the partial motion for summary judgment. We find that the 2006 amendments to La. R.S. 22:658 cannot be applied retroactively and adjust the penalty award accordingly. The trial court erred in awarding attorney's fees; therefore, we vacate the award. Lastly, we find the jury properly determined the property damage amounts and affirm as amended.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Hurricane Katrina ("Katrina") brought catastrophic loss to New Orleans on August 29, 2005. With the naturally occurring storm also came the failure of the levee system built and maintained by the United States Army Corps of Engineers, causing New Orleans to be inundated with water. Joseph Sher ("Mr. Sher") owned and lived in a five-unit apartment building ("Building") located at 1410 Broadway Street. Three weeks prior to Katrina, Mr. Sher suffered three heart attacks, which required surgery and a hospital stay. He thought evacuating would be too strenuous and decided to remain in his apartment during the mandatory evacuation period.

During Katrina, Mr. Sher said that the Building shook, water came in around the windows, and it appeared that the walls were "weeping." Early Tuesday morning, August 30, 2005, Gayle Parmelee, one of Mr. Sher's tenants who remained with Mr. Sher in the Building during the mandatory evacuation period, observed water rising around the Building. The water inundated the basement level of the Building with approximately four feet of water. Mr. Sher later evacuated the Building in a canoe and traveled to Baton Rouge to reside with one of his sons.

Mr. Sher first obtained his commercial all-risk[1] insurance policy ("Policy") on the Building with Lafayette Insurance Company ("Lafayette") in 1989. Mr. Sher[2] notified Lafayette of his insurance claim during the first or second week of September 2005. Lafayette assigned Mr. Sher's claim to Property Loss Consulting, Inc. ("PLC") around October 5, 2005, when Lafayette asserts it first learned of the claim. Following the initial inspection of the Building, Lafayette determined that most of the damage to the Building was not covered under the Policy because the damage was caused by lack of maintenance, disrepair, or flooding. Lafayette estimated Mr. Sher's

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[1] Tom Miller, a United Fire and Casualty Company claims supervisor, testified that an "all-risk" insurance policy covers "all risks except those that are excluded or limited within the policy."

[2] Mr. Sher communicated with Lafayette throughout the process via his son Leopold Sher.

covered damages at $3,307.09. Lafayette then subtracted a hurricane deductible of $1,000 and a premium price of $2,037, which meant Mr. Sher was issued a check for $270.09. Mr. Sher then began to dispute the covered damages with Lafayette.

Following a second inspection conducted by Fred Vanderbrook ("Mr. Vanderbrook"), a consulting engineer retained by Lafayette for inspection of the roof and interior of the Building, Lafayette issued a supplemental check to Mr. Sher for $2,484.99. Neither check was ever negotiated. Mr. Sher forwarded additional estimates and invoices for repairs to Lafayette that he felt the Policy covered. Lafayette did not tender payment for the estimates or invoices.

Mr. Sher filed a petition for insurance coverage, bad faith penalties, attorney's fees and costs, and had faith breach of insurance contract on August 28, 2006, against Lafayette; United Fire and Casualty Company ("UFC"); the United Fire Group ("UFG"); Robert Jones ("Mr. Jones"); Wes Swank ("Mr. Swank"); Mr. Vanderbrook; and PLC. Lafayette asserted the declinatory exception of lis pendens in its answer, which was dismissed. UFC and UFG then filed a motion for summary judgment as a matter of law asserting that Mr. Sher had no claims regarding their liability. Mr. Sher then dismissed UFC and UFG without prejudice.

Mr. Vanderbrook filed a dilatory exception of vagueness/ambiguity. Mr. Sher then dismissed Mr. Vanderbrook without prejudice.

Lafayette then filed a motion for leave to file a third party demand against R. David Paulison, as the director of the Federal Emergency Management Agency, FEMA, and the National Flood Insurance Program ("NFIP"), which the trial court denied due to time constraints of the impending trial.

Mr. Sher filed a motion for partial summary judgment as a matter of law against Lafayette that the Policy covered his damages. The trial court then granted Mr. Sher's motion for partial summary judgment holding that the flood exclusion contained in the Policy was ambiguous; therefore, it covered "man-made events." Additionally, the trial court held that "Lafayette has not met its burden of proving" that Mr. Sher's "damage was not caused by a man-made event." Lastly, the trial court denied Lafayette's motion to strike an expert witness or to continue the trial.

Lafayette filed a motion in limine to exclude new theories of recovery not disclosed prior to trial, which the trial court granted. Mr. Sher then filed a motion in limine to exclude limitations or exclusions not properly pled in Lafayette's answer as affirmative defenses, which the trial court granted finding that each exclusion or limitation needed to be specifically pled.

Lafayette followed with a motion in limine to exclude prejudicial statements. Lafayette wanted to preclude Mr. Sher from revealing to the jury that he was a Holocaust survivor. The trial court denied the motion to exclude prejudicial statements regarding the Holocaust on a limited basis.

The trial court bifurcated the trial into two phases, with the second phase pertaining only to the alleged arbitrary and capriciousness of Lafayette. After a five-day trial, including both phases, the jury awarded damages as follows:

Building Damage Above the Basement	$ 175,850
Building Damage in the Basement	$ 144,300
Lost Rents	$ 17,350
Business Personal Property	$ 31,577
Penalties Pursuant to La. R.S. 22:658	$ 184,538.50
TOTAL	$ 553,615.50

The trial court reserved the amount of attorney's fees and costs, plus interest from the date of judicial demand until paid, for determination at a later date. Following the trial, Mr. Sher dismissed and reserved his rights against Mr. Jones, Mr. Swank, and PLC.

Lafayette filed a motion for a new trial or alternatively remittitur, which was denied. Lafayette then timely filed this suspensive appeal. The trial court assessed attorney's fees and costs as follows:

Costs Pursuant to La. C.C.P. art. 1920	$ 16,288.60
Costs Pursuant to La. C.C.P. art. 970	$ 42,020.24
Attorney's Fees Pursuant to La. C.C. art. 1997 and/or La. R.S. 22:658	$ 258,728
TOTAL	$ 317,036.84

Thus, the total amount assessed against Lafayette was $870,652.34.

Lafayette appeals asserting that the trial court erred by: 1) granting Mr. Sher's motion for partial summary judgment; 2) retroactively applying an amendment to La. RS. 22:658; 3) awarding $258,728 in attorney's fees; 4) striking defenses other than flood and NFIP; 5) not allowing a credit for Mr. Sher's NFIP policy; 6) awarding $42,020.24 in costs pursuant to La. C.C.P. art. 970; 7) awarding legal interest on penalties and attorney's fees from the date of judicial demand; 8) entering judgment on the jury's finding of arbitrary and capriciousness; 9) entering judgment on the jury's award of $31,577 for business personal property ("BPP"); 10) entering judgment on the jury's award for lost rents; and 11) entering judgment on the jury's award for building damages. Mr. Sher answered the appeal asserting that the trial court erred in refusing to instruct the jury regarding damages for mental anguish and that the jury interrogatories should have included an opportunity to award such damages.

PARTIAL SUMMARY JUDGMENT

Lafayette asserts the trial court erred by granting Mr. Sher's motion for partial summary judgment and determining that the meaning of flood in the context of the Policy was ambiguous.

Appellate courts review summary judgments using the *de novo* standard of review. *Denson v.*

Diamond Offshore Co., 06-0568, p. 3 (La. App. 4 Cir. 3/28/07), 955 So. 2d 730, 732. To find genuine issues of material fact, the reviewing court examines the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." La. C.C.P. art. 966(B). If no genuine issues of material fact exist and the "mover is entitled to judgment as a matter of law," then summary judgment should be granted. La. C.C.P. art. 966(B). The mover bears the burden of proof. La. C.C.P. art. 966(C)(2).

An insurance policy is a contract.[3] The Louisiana Civil Code states that the "[i]nterpretation of a contract is the determination of the common intent of the parties." La. C.C. art. 2045. Further, "[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent." La. C.C. art. 2046. If a word in a contract is not defined in the document, it must be given its "generally prevailing meaning." La. C.C. art. 2047. However, "[w]ords susceptible of different meanings must be interpreted as having the meaning that best conforms to the object of the contract." La. C.C. art. 2048. When determining the meaning best conforming to the object of the contract, the meaning must be one that renders it effective and not one that renders it ineffective. La. C.C. art. 2049.

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[3] "A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished." La. C.C. art. 1905.

Provisions of a contract must be interpreted along with the contract in totem. La. C.C. art. 2050. Although worded in general terms, a contract "must be interpreted to cover only those things it appears the parties intended to include." La. C.C. art. 2051. "When the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to whatever the law, equity, or usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose." La. C.C. art. 2054. Ultimately, if doubt exists, "a provision in a contract must be interpreted against the party who furnished its text" La. C.C. art. 2056. Thus, "[a] contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party" La. C.C. art. 2056.

The Policy contains the following water exclusion, in pertinent part:

B. EXCLUSIONS

> **1.** We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> . . . .

g. Water

(1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;

(2) Mudslide or mudflow;

(3) Water that backs up from a sewer or drain; or

(4) Water under the ground surface pressing on, or flowing or seeping through:

(a) Foundations, walls, floors or paved surfaces;

(b) Basements, whether paved or not; or

(c) Doors, windows or other openings

The Policy also contains a section entitled "SECTION V – DEFINITIONS," which includes the definitions of words used in the policy. However, "flood" is not defined in this section.

The common intent of the parties in an insurance contract is to provide insurance coverage. The meaning of "flood" is not defined within the Policy. Therefore, it must be given its generally prevailing meaning. However, because "flood" is susceptible to different meanings due to varying causes of floods, we must find a meaning that conforms to the object of

the contract, which also renders the contract effective.

A review of the Policy reveals that the parties intended to cover and include all risks that were not specifically excluded or limited. Lafayette failed to specifically exclude all floods because of the ambiguity contained within the water exclusion. While the Policy states that it does not cover damage caused by a "flood," it also states that it does not cover "waves, tides, tidal waves" and the "overflow of any body of water . . . whether driven by the wind or not." This exclusion includes "flood," but then continues to list specific natural disasters that cause inundations of water, commonly labeled as "floods." For example, a varying cause of a flood can be man-made or natural, as documented in La. R.S. 29:762, which states that a "flood" is a "natural disaster."[4]

A contract must be interpreted to achieve its purpose. La. C.C. art. 2054. The purpose of the Policy was to provide insurance coverage for all risks not specifically excluded or limited. Therefore, in case of any doubt, when interpreting a contract of a standard form, the contract must be interpreted against Lafayette as the issuer of the Policy.

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[4] La. R.S. 29:762 Definitions reads, in pertinent part:

(12)(a)(iii) A disaster, including but not limited to natural disasters such as hurricane, tornado, storm, flood, ...

As such, after a *de novo* review, we make the legal determination that the Policy with Lafayette is ambiguous as it relates to the water exclusion because it is unclear what types of floods are excluded. Therefore, strictly construed against Lafayette, Mr. Sher is covered for the damage to the basement level of the Building.

MENTAL ANGUISH

Mr. Sher asserts that the trial court erred by refusing to instruct the jury as to general damages for mental anguish, inconvenience, and emotional distress.[5] He requested that the trial court include the following jury charges:

> ***Plaintiff's Proposed Jury Charge Regarding General Damages***
>
> A finding that an insurance company breached the duty owed to its insured of good faith and fair dealing, pursuant to Louisiana Revised Statutes 22:1220, entitles the insured to recover penalties against the insurer for "any damages sustained as a result of the breach." Such damages may include general damages for mental anguish and emotional distress associated with the pursuit of the insurance claim, as well as aggravation and inconvenience.
>
> La. RS. 22:1220

[5] The trial court denied the admittance of the requested charges and proffered Mr. Leopold Sher's testimony regarding Mr. Sher's alleged mental anguish.

Lewis v. State Farm Ins. Co., 41.527 (La. App. 2 Cir. 12/27/06), 946 So. 2d 708, 728.

Reed v. Ricard, [sic] 97-2250 (La. App. 1 Cir. 11/18/98), 744 So. 2d 13, 19.

Williams v. La. Indemn. Co., 26,887 (La. App. 2 Cir. 6/21/95), 658 So. 2d 739, 743.

Plaintiff's Proposed Jury Charge Regarding Mental Anguish

The finding that an insurance company violated Louisiana Civil Code Article 1997 by engaging in a bad faith breach of contract supports an award of damages for inconvenience, anguish and the like resulting from the actions of the defendant.

La. C.C. art. 1997.

Modisette v. Am. Integrity Ins. Co., 297 So. 2d 498 (La. App. 2nd Cir. 1974).

Plaintiff's Proposed Jury Charge Regarding Mental Anguish

Damages for nonpecuniary losses such as emotional distress and mental anguish are also available under Louisiana Civil Code Article 1998, which allows recovery of such damages where the contract is intended to gratify a nonpecuniary interest.

The nonpecuniary interest need only be a "significant" object or cause of the contract, as opposed to the primary or exclusive object of the contract for such damages to be recoverable. Damages for nonpecuniary losses can

> be recovered where the contract is intended to gratify both pecuniary and nonpecuniary interests. Contracts pertaining to plaintiff's residence can satisfy such an objective.
>
> La. C.C. art. 1998.
>
> *Young v. Ford Motor Co.*, 595 So. 2d 1123, 1124 (La. 1992).
>
> *Thomas v. Desire Comm. Hous. Corp.*, 98-2097 (La. App. 4 Cir. 7/19/00), 773 So. 2d 755, 763.
>
> *Taylor v. Burton*, 93-1348 [sic] (La. App. 3 Cir. 3/6/98), 708 So. 2d 531, 535-36.

Mr. Sher requests that this Court award him general damages of $500,000 for mental anguish, inconvenience, and emotional distress.

Rejecting a requested jury instruction constitutes an error of law when it is "prejudicial" by "materially" affecting the result and depriving "a party of substantial rights." *Lam v. State Farm Mut. Auto. Ins. Co.*, 03-0180, p. 4 (La. App. 4 Cir. 4/1/05), 901 So. 2d 559, 564, *rev'd in part on other grounds*, 05-1139 (La. 11/29/06), 946 So. 2d 133. The manifest error standard presumes the jury utilized the correct law. *Rathey v. Priority EMS, Inc.*, 04-0199, p. 27 (La. App. 4 Cir. 1/12/05), 894 So. 2d 438, 458, *writ denied*, 05-0789 and 05-0802 (La. 5/6/05), 901 So. 2d 1107, 1108.

De novo review will be used by the appellate court "if the jury applied the incorrect law because of erroneous jury instructions" and it "could have affected the jury's decision." *Rathey*, 04-0199, pp. 27-28, 894 So. 2d at 459. "*De novo* review is used only if the jury charges precluded 'the jury from reaching a verdict based on the law and the facts.'" *Chaisson v. Avondale Indus., Inc.*, 05-1511, p. 27 (La. App. 4 Cir. 12/20/06), 947 So. 2d 171, 190, *quoting Jones v. Liberty Mut. Ins. Co.*, 568 So. 2d 1091, 1094 (La. App. 5th Cir. 1990). "Ultimately, the determinative question is whether the jury instructions misled the jury to the extent that it was prevented from dispensing justice." *Nicholas v. Allstate Ins. Co.*, 99-2522, p. 8 (La. 8/31/00), 765 So. 2d 1017, 1023.

"[I]t is well established that damages for mental anguish are recoverable in tort actions." *Gele v. Markey*, 387 So. 2d 1162, 1164 (La. 1980). The damages sought by Mr. Sher "are not recoverable for breach of lease or of any contract unless psychological gratification was the primary object of the contract." *Buddy's Tastee No. 1. Inc. v. Tastee Donuts, Inc.*, 483 So. 2d 1321, 1324 (La. App. 4th Cir. 1986). However, "courts have been willing to compensate victims of mental distress in contract cases which have elements of tort actions." *Id.* "[B]are allegations of depression and embarrassment" are not sufficient. *Id.* Louisiana law dictates "that the object of a contract of insurance is the payment of money." *Dixon v. First Premium Ins. Group*, 05-0988, p. 16 (La. App. 1 Cir.

3/29/06), 934 So. 2d 134, 146, *writ denied*, 06-0978 (La. 6/16/06), 929 So. 2d 1291.

The case *sub judice* presents a contract of insurance, the object of which is to pay money. There is no evidence that psychological gratification or nonpecuniary interests was the object of this Policy. The proffered testimony of Mr. Leopold Sher addresses Mr. Sher's alleged mental anguish. Mr. Leopold Sher contended that Mr. Sher was "sick in his heart and mentally and emotionally upset every single day." However, the record lacks evidence of Lafayette's actions, other than failure to pay, that would demonstrate that "the obligor intended, through his failure, to aggrieve the feelings of the obligee." La. C.C. art. 1998. The evidence in the record does not rise to the level that would merit the award of mental anguish damages in a contractual based action as opposed to a delictual based action. As such, we find that the trial court did not commit an error of law by refusing to include Mr. Sher's proposed jury instructions as he was not materially or prejudicially affected or deprived of substantial rights.

FLOOD INSURANCE POLICY CREDIT

We pretermit the discussion of Lafayette's claim for a credit for flood insurance policy payments as no evidence in the record exists to establish Mr. Sher received payments from the NFIP.

STANDARD OF REVIEW

The remaining issues in the case *sub judice* pertain to factual determinations, legal issues, and damage awards, which require the appellate court to utilize the following standards of review.

Factual determinations are reviewed with the manifestly erroneous/clearly wrong standard. *Rosell v. ESCO*, 549 So. 2d 840, 844 (La. 1989). Reviewing and reversing the factfinder's determinations involves a two-part test developed by the Louisiana Supreme Court. *Mart v. Hill*, 505 So. 2d 1120, 1127 (La. 1987). The reviewing court must find that no reasonable factual basis exists for the trial court's findings and that the findings are wrong or "manifestly erroneous" according to the record. *Id.* The entire record must be reviewed to determine whether the factfinder was clearly wrong. *Stobart v. State, Through Dept. of Transp. and Dev.*, 617 So. 2d 880, 882 (La. 1993). The factfinder has a "better capacity to evaluate live witnesses." *Canter v. Koehring Co.*, 283 So. 2d 716, 724 (La. 1973). Thus, "the appellate court must determine if the factfinder's decision was a reasonable one." *Norfleet v. Lifeguard Transp. Serv., Inc.*, 05-0501, p. 5 (La. App. 4 Cir. 5/17/06), 934 So. 2d 846, 852. "[W]here two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong." *Stobart*, 617 So. 2d at 883.

Damage awards by the factfinder are not altered or reversed absent an abuse of discretion. Factfinders

have "much discretion" when assessing damages. La. C.C. art. 2324.). The damage amount is "entitled to great deference on review." *Trunk v. Med. Ctr. of La. at New Orleans*, 04-0181, p. 9 (La. 10/19/04), 885 So. 2d 534, 539, *citing Wainwright v. Fontenot*, 00-0492, p. 6 (La. 10/17/00), 774 So. 2d 70, 74. Accordingly, the abuse of discretion standard is utilized. *Youn v. Maritime Overseas Corp.*, 623 So. 2d 1257, 1260 (La. 1993). Notwithstanding opposing viewpoints on an appropriate award, an abuse of discretion is found only if the award is "beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances." *Id.* 623 So. 2d at 1261.

Legal errors are reviewed by appellate courts with a *de novo* standard. *Overton v. Shell Oil Co.*, 05-1001, p. 8 (La. App. 4 Cir. 7/19/06), 937 So. 2d 404, 410.

STRICKEN DEFENSES

Lafayette avers the trial court legally erred by not allowing it to present defenses other than the water exclusion and payments made under an NFIP policy. The trial court held that Lafayette did not specifically plead all of the exclusions from the Policy as affirmative defenses;[6] thus, the exclusions/limitations

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[6] As determining what constitutes an affirmative defense is a question of fact, we do not find that the trial court committed

(Continued on following page)

were waived. Lafayette's Answer included the following language:

> Lafayette adopts the terms, conditions, coverages, exclusions and endorsements of its policy, as if copied herein *in extensio*, [sic] as a defense to petitioner's claims; Lafayette further pleads all defenses, exclusions, rights and remedies under the policy of insurance issued by Lafayette to petitioner.

Lafayette asserts that this pled the Policy in its entirety as an affirmative defense.

"[A] defendant's answer must set forth any matter constituting an affirmative defense." *Pendleton v. Smith*, 95-1805, p. 5 (La. App. 4 Cir. 5/8/96), 674 So. 2d 434, 437. *See* La. C.C.P. art. 1005. "An affirmative defense raises a new matter, which assuming the allegations in the petition are true, constitutes a defense to the action." *Allvend, Inc. v. Payphone Comm'ns Co.*, 00-0661, p. 5 (La. App. 4 Cir., 5/23/01), 804 So. 2d 27, 30. The list of affirmative defenses contained in La. C.C.P. art. 1005 is "illustrative, not exclusive." *Bienvenu v. Allstate Ins. Co.*, 01-2248, p. 5 (La. App. 4 Cir. 5/8/02), 819 So. 2d 1077, 1079. "Whether an issue is an affirmative defense is a question of fact, determined by the circumstances of the individual case." *Bienvenu*, 01-2248, p. 5, 819 So. 2d at 1080. "Reliance upon an exclusion in an

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manifest error by labeling Lafayette's other defenses as affirmative defenses.

insurance contract is considered to be an affirmative defense, which must be specially pleaded in defendant's answer." *Pendleton*, 95-1805, 674 So. 2d at 437. "In the absence of such a pleading, no proof can be offered in connection with the exclusion." *Id.*

The purpose of specifically pleading an affirmative defense is to give fair notice to the plaintiff of the nature of defenses. *Bienvenu*, 01-2248, p. 6, 819 So. 2d at 1080. Special pleading prevents "trial by ambush" and does not give the defendant an unfair advantage. *Walters v. Metro. Erection Co.*, 94-0162 and 94-0475 (La. App. 4 Cir. 10/27/94), 644 So. 2d 1143, 1147. Pleading an insurance policy "in extenso" does not meet the requirement that affirmative defenses be specifically pled. *Dixie Sav. and Loan Ass'n v. Pitre*, 99-154, pp. 23-24 (La. App. 5 Cir. 7/27/99), 751 So. 2d 911, 924-25, *writ denied*, 99-2867 (La. 12/10/99), 751 So. 2d 855.

Lafayette refers to two cases to support the assertion that pleading an insurance policy in extenso is sufficient as a general rule. Lafayette asserts that *Brantley v. State Farm Ins. Co.*, 37,601 (La. App. 2 Cir. 1/28/04), 865 So. 2d 265, and *Levet v. Calais & Sons, Inc.*, 514 So. 2d 153 (La. App. 5th Cir. 1987), maintain the proposition that Louisiana appellate courts have ruled that pleading the policy is sufficient. We find these cases distinguishable from *Dixie*, as the cases do not establish a general rule that pleading a policy in its entirety complies with the requirements of La. C.C.P. art. 1005.

In *Brantley*, the trial court allowed the defendant to submit a handwritten answer, which asserted "all defenses under the policy" on the day of trial. 37,601 at pp. 8-9, 865 So. 2d at 270. The plaintiffs alleged that they were prejudiced by the ruling because no continuance was granted. *Brantley*, 37,601, p. 8, 865 So. 2d at 270. The trial court gave the plaintiffs an opportunity to file a motion for summary judgment following the filing of the answer and prior to the recommencement of trial, which they declined. *Id.* The appellate court found that "[b]ased upon this record," the trial court was not clearly wrong "in finding that the answer was sufficient and in denying the motion to strike." *Brantley*, 37,601, p. 9, 865 So. 2d at 270.

Similarly limited to particular facts and circumstances, in *Levet*, the defendant and the defendant's insurer pled the insurance policy "in extenso." 514 So. 2d at 160. However, the defendant and the plaintiffs opposed the insurer's motion to limit liability based on the fact that the policy limits were not specifically pled. *Levet*, 514 So. 2d at 160. The appellate court found that the policy limit was deemed admitted because of the failure to respond to a request for admissions. *Id.* Like *Brantley*, the appellate court did not hold as a general rule that pleading a policy "in extenso" was sufficient to comply with La. C.C.P. art. 1005. Thus, neither appellate court found, as a general rule, that specific provisions of an insurance policy, intended to be used as affirmative defenses, need not be pled if the answer states that

the defendant pleads the policy or the policy in extenso.

Thus, given the nature and purpose of affirmative defenses and that Lafayette did not specifically plead defenses other than NFIP and the water exclusion, we find that the trial court did not commit legal error in precluding the presentation of other defenses, as in extenso is insufficient to plead other exclusions and limitations of the Policy.

BUSINESS PERSONAL PROPERTY

Lafayette maintains that the trial court committed legal error by allowing evidence of Mr. Sher's BPP into evidence and submitting the issue to the jury because it claims the Policy did not cover Mr. Sher's BPP due to the lack of a BPP limit or information on the declaration page of the Policy. However, Lafayette failed to plead that the Policy did not cover BPP as an affirmative defense. Additionally, Lafayette never raised it in a reservation of rights. Thus, Mr. Sher asserts that this affirmative defense was waived. Lafayette moved for a directed verdict on the issue of BPP at the close of Mr. Sher's case-in-chief, which the trial court denied.

The Policy states, on the "Building and Personal Property Coverage Form," in pertinent part:

> **A. COVERAGE**
>
> We will pay for direct physical loss of or damage to Covered Property at the

premises described in the Declaration caused by or resulting from any Covered Cause of Loss.

1. Covered Property

Covered Property, as used in this Coverage Part, means the following types of property for which a Limit of Insurance is shown in the Declarations:

a. Building meaning the building or structure described in the Declarations, including:

(1) Completed additions;

(2) Permanently installed:

(a) Fixtures;

(b) Machinery; and

(c) Equipment;

(3) Outdoor fixtures;

(4) Personal property owned by you that is used to maintain or service the building or structure or its premises, including:

(a) Fire extinguishing equipment;

(b) Outdoor furniture;

(c) Floor coverings; and

(d) Appliances used for refrigerating ventilating,

> cooking, dishwashing or laundering,

The form referenced above also includes the following section regarding BPP, in pertinent part:

> **b. Your Business Personal Property** located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises, consisting of the following unless otherwise specified in the Declarations or on the Your Business Personal Property – Separation of Coverage form:
>
> **(1)** Furniture and fixtures;
>
> **(2)** Machinery and equipment;
>
> **(3)** "Stock;"
>
> **(4)** All other personal property owned by you and used in your business;
>
> **(5)** Labor, materials or services furnished or arranged by you on personal property of others;
>
> **(6)** Your use interest as tenant in improvements and betterments. Improvements and betterments are fixtures, alterations, installations or additions:

> **(a)** Made a part of the building or structure you occupy but do not own; and
>
> **(b)** You acquired or made at your expense but cannot legally remove;
>
> **(7)** Leased personal property for which you have a contractual responsibility to insure, unless otherwise provided for under Personal Property of Others.

Mr. Sher submitted a list of the contents he lost and the respective values into evidence. All of the items reported on Mr. Sher's list are covered by either the section under "building coverage," "BPP," or both. Irrespective of a finding that Lafayette waived the argument that the Policy does not cover BPP, there is not a definitive statement that the Policy does not include BPP. There is merely no reference to BPP specifically on the declaration page in the Policy. This creates ambiguity that is construed against Lafayette. Therefore, we find that the trial court did not commit legal error and the jury was neither manifestly erroneous not abused its discretion by awarding Mr. Sher $31,577 for BPP.

LOST RENTS

Lafayette contends the trial court erred by entering judgment on the jury's award for $17,350 in lost rents. Lafayette claims the lost rents award should be

reduced to $4,600 because it states the loss from Apartment E was based on flood damage and the loss from Apartments A and C was based on post-Katrina valuations. In order to arrive at $4,600, Lafayette did not include $8,550 for Apartment E and used the pre-Katrina valuations of $700 a month for Apartments A and C.

Mr. Leopold Sher, Mr. Sher's son, testified as to the amount of rent Mr. Sher lost following Katrina because of the damage to the Building. He stated that the rent for both Apartments A and C prior to Katrina was $700 each and Apartment E was $450. He further stated that, after reviewing the prices in the post-Katrina market, both Apartments A and C each had a monthly value of $1,400 and Apartment E $450. Mr. Sher also testified as to these valuations. The jury determined Mr. Sher's lost rents as follows:

Apartment A:	$400 + ($1,400 x 2 months)	$ 3,200
Apartment C:	$1,400 x 4 months	$ 5,600
Apartment E:	$450 x 19 months	$ 8,550
TOTAL		$17,350

The Policy includes a section on business income coverage, which reads, in pertinent part:

> **A. COVERAGE**
>
> Coverage is provided as described below for one or more of the following options for which a Limit of Insurance is shown in the Declarations:

> (i) Business Income including "Rental Value".
>
> . . . .
>
> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration".

The Policy covers Mr. Sher's "actual loss" of business income.

As we found above, the ambiguous water exclusion in the Policy covers floods. Therefore, we find Lafayette's assertion as to the lost rents from Apartment E without merit. With respect to Apartments A and C, we find that the jury's award was not manifestly erroneous because the Policy covers actual loss. The jury had the opportunity to weigh Mr. Sher and Mr. Leopold Sher's credibility as to their study of post-Katrina valuations. If Mr. Sher could have leased Apartments A and C post-Katrina, then, according to Mr. Leopold Sher's testimony regarding the new rental market, he would have been able to collect $1,400 a month on each apartment. Therefore, we affirm the award of lost rents as the jury did not commit manifest error or abuse its discretion.

BUILDING DAMAGES

Lafayette maintains that Mr. Sher's building damages should be reduced for the following reasons: 1) forty-five percent allowance for overhead and profit

is gouging; 2) "water hammer" damages are not covered under the Policy; 3) there was no evidence of structural damage; 4) the jury's verdict is in excess of the amounts estimated by $50,000; and 5) Lafayette should get a credit for amounts paid.

Gouging

The jury awarded Mr. Sher $320,150 for damages to the Building. Lafayette asserts that the award reflects a forty-five percent allowance for overhead and profit. Barry Scairono ("Mr. Scairono"), Mr. Sher's expert in architecture; water intrusion analysis; roofing; cost estimation; and construction administration, provided the estimates for repairing the upper level and basement level of the Building, which contained a twenty-five percent allowance for overhead and profit and a twenty percent allowance as an amount for unknown contingencies.

Mr. Scairono prepared an "opinion of probable repair costs" for the damage to the upper level of the Building and another for damage to the basement level of the Building. Mr. Scairono's estimates for repairs to the upper level and basement level of the Building were $134,850 and $144,300, respectively. These estimations included a twenty-five percent allowance for overhead and profit. Mr. Scairono testified that twenty-five percent was "reasonable" and "typical" for an overhead and profit allowance. He also stated that the Louisiana Office of State Facility Planning and Control, the entity that does

the construction for the [sic] Louisiana, allows for a twenty-five percent allowance. A separate cost of twenty percent was included for contingency purposes. Mr. Scairono described the contingency as money included for "unidentified costs in construction jobs."

Lafayette combined the percentage allocated for overhead and profit with that for contingency. However, due to the testimony of Mr. Sciarono [sic], which differentiated the two calculations, we find neither manifest error nor abuse of discretion in the jury's determination.

Water Hammer

Lafayette avers that damages associated with the "water hammer" effect[7] should he subtracted from the jury's award because it was not covered under the Policy. However, the trial court ruled that Lafayette was precluded from asserting additional affirmative defenses that it did not specifically plead. We affirmed the ruling regarding additional affirmative defenses. Therefore, we find that this argument is precluded.

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[7] The "water hammer" effect results from a sudden increase in water pressure, which can burst water mains and pipes, etc.

Structural Damage

Further, Lafayette contends that the award for structural damage should be reduced because Mr. Sher alleges structural damage that was not proven. Lafayette also avows that the amount the jury awarded Mr. Sher to inspect for structural damage should be deducted from the building damages award.

Roy Carubba ("Mr. Carubba"), Mr. Sher's expert in civil engineering, with a subspecialty in structural engineering, and as a contractor, testified that the Building cracked because it shook for two to three hours. Mr. Carubba testified that the porch moved from the wind and that constituted structural damage. He also stated that he believes there is "underlying structural damage" to the Building, but that cracks could appear without structural damage. In order to repair the structural damage he observed in the Building, Mr. Carubba stated it would cost approximately $42,410. Mr. Sciarono [sic] also testified that it would cost between $50,000 and $80,000 to determine whether there was further interior structural damage.

Dr. Jerry Householder ("Dr. Householder"), Lafayette's expert in construction and structural engineering, testified that there was no evidence of structural damage in the Building. However, Dr. Householder stated that he "hasn't seen any proof there is no structural damage."

Lafayette avows that the amount awarded by the jury for building damages exceeds the amount estimated by $50,000 because it presumes that the jury included the money to allow Mr. Sher to inspect for further structural damage to the Building.

The factfinder is allowed great discretion when awarding damages. "One injured through the fault of another is entitled to full indemnification for damages caused thereby." *Hornsby v. Bayou Jack Logging*, 04-1297, p. 5 (La. 5/6/05), 902 So. 2d 361, 365. The injured party should have his property restored "as nearly as possible to the state it was in immediately preceding the damage. . . ." *Coleman v. Victor*, 326 So. 2d 344, 346 (La. 1976). "The amount of damages is dependant on the facts of each case." *Gulfstream Servs., Inc. v. Hot Energy Servs., Inc.*, 04-1223, p. 10 (La. App. 1 Cir. 3/24/05), 907 So. 2d 96, 103.

Mr. Sciarono [sic] testified that it would cost between $50,000 and $80,000 for Mr. Sher to inspect for interior structural damage to the Building. Given this testimony and the facts of the case *sub judice*, we do not find that the fury committed manifest error by including money for a structural inspection in the total building damages award as the jury may have determined that a structural inspection was necessary to properly restore the Building to its pre-Katrina condition.

Amounts Paid

We find that Lafayette should not receive a credit for amounts paid because Mr. Leopold Sher testified that the two checks Lafayette issued to Mr. Sher, totaling $2,755.08, were never negotiated.

In sum, the jury heard the testimony of experts and adjusters regarding the Building. It was in a better position to evaluate credibility and weigh the evidence in correlation with the witnesses. Accordingly, we find that the jury did not commit manifest error or an abuse of discretion by awarding Mr. Sher $320,150 for building damages.

ARBITRARY, CAPRICIOUS, & WITHOUT PROBABLE CAUSE

Lafayette maintains that it did not act arbitrarily, capriciously, or without probable cause by failing to timely pay Mr. Sher.

Statutes regarding the imposition of penalties on insurers for arbitrary and capricious conduct are penal in nature and must be strictly construed. *Maurice v. Prudential Ins. Co.*, 02-0993, p. 9 (La. App. 4 Cir. 10/23/02), 831 So. 2d 381, 388. The applicable revision of La. R.S. 22:658 states, in pertinent part:

> A. (1) All insurers issuing any type of contract, other than those specified in R.S. 22:656, R.S.. 22:657, and Chapter 10 of Title 23 of the Louisiana Revised Statutes of 1950, shall pay the amount of any claim due any insured within thirty days after receipt of

satisfactory proofs of loss from the insured or any party in interest.

. . . .

(3) Except in the case of catastrophic loss, the insurer shall initiate loss adjustment of a property damage claim and of a claim for reasonable medical expenses within fourteen days after notification of loss by the claimant. In the case of catastrophic loss, the insurer shall initiate loss adjustment of a property damage claim within thirty days after notification of loss by the claimant. Failure to comply with the provisions of this Paragraph shall subject the insurer to the penalties provided in R.S. 22:1220.

(4) All insurers shall make a written offer to settle any property damage claim, including a third-party claim, within thirty days after receipt of satisfactory proofs of loss of that claim.

B. (1) Failure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor or failure to make a written offer to settle any property damage claim, including a third-party claim, within thirty days after receipt of satisfactory proofs of loss of that claim, as provided in Paragraphs (A)(1) and (4), respectively, or failure to make such payment within thirty days after written agreement or settlement as provided in Paragraph (A)(2), when such failure is found to be arbitrary, capricious, or without

> probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of twenty-five percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater, payable to the insured, or to any of said employees, or in the event a partial payment or tender has been made, twenty-five percent of the difference between the amount paid or tendered and the amount found to be due. . . .

La. R.S. 22:658. The applicable version of La. R.S. 22:1220 states, in pertinent part:

> A. An insurer, including but not limited to a foreign line and surplus line insurer, owes to his insured a duty of good faith and fair dealing. The insurer has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant, or both. Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach.
>
> B. Any one of the following acts, if knowingly committed or performed by an insurer, constitutes a breach of the insurer's duties imposed in Subsection A:
>
> . . . .
>
> (5) Failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such

> failure is arbitrary, capricious, or without probable cause.
>
> C. In addition to any general or special damages to which a claimant is entitled for breach of the imposed duty, the claimant may be awarded penalties assessed against the insurer in an amount not to exceed two times the damages sustained or five thousand dollars, whichever is greater. Such penalties, if awarded, shall not be used by the insurer in computing either past or prospective loss experience for the purpose of setting rates or making rate filings . . .

La. R.S. 22:1220.

The factfinder's determination that an insurer arbitrarily and capriciously handled a claim is a factual finding subject to the manifestly erroneous/clearly wrong standard. *Calogero v. Safeway Ins. Co. of La.*, 99-1625. p. 5 (La. 1/19/00), 753 So. 2d 170, 173. Mr. Sher, as the insured, bears the burden of proving the alleged arbitrary and capricious behavior of Lafayette. *Warner v. Liberty Mut. Fire Ins. Co.*, 543 So. 2d 511, 515 (La. App. 4th Cir. 1989). An insurer acts arbitrary and capricious "when its willful refusal of a claim is not based on a good faith defense . . . or is unreasonable or without probable cause." *Calogero*, 99-1625, p.5, 753 So. 2d at 173. "[I]f part of a claim for property damage is not disputed, the failure of the insurer to pay the undisputed portion of the claim within the statutory delay will subject the insurer to

penalties on the entire claim." *Warner*, 543 So. 2d at 515. Lafayette has an

> affirmative duty to verify, through a reasonable investigation, whether a claim was actually excluded from coverage and when an insurer chooses to resist its contractual obligation based upon a supposed defense, which a reasonable investigation would have proved to be without merit, it acts at its peril and renders itself liable for statutory penalties and attorney's fees.

Deutschmann v. Rosiere, 02-2002, p. 6 (La. App. 4 Cir. 4/9/03), 844 So. 2d 1082, 1086. Further,

> [a]n insurer must take the risk of misinterpreting its policy provisions. If it errs in interpreting its own insurance contract, such error will not be considered as a reasonable ground for delaying the payment of benefits, and it will not relieve the insurer of the payment of penalties and attorney's fees.

LeBlanc v. Underwriters at Lloyd's, London, 402 So. 2d 292, 299 (La. App. 3rd 1981), *quoting Carney v. Am. Fire and Indem. Co.*, 371 So. 2d 815, 819 (La. 1979).

Adjustment Initiation Within Thirty Days

Lafayette states that it did not receive notice of Mr. Sher's claim until October 5, 2005, when the claim was assigned to Mr. Jones, a claims adjuster working for PLC through his company, Robert's

Construction. Lafayette further asserts that Mr. Jones telephoned Mr. Sher on October 9, 2005, but did not speak with him. Mr. Jones testified that he made arrangements to inspect the Building on November 1, 2005.

Mr. Leopold Sher testified that he "notified" Lafayette of Mr. Sher's loss sometime during the first two weeks of September 2005. He stated that Mr. Jones spoke with him in October 2005. However, the Building was not inspected until November 1, 2005.

Loss adjustment initiation "requires that 'the insurer take some substantive and affirmative step to accumulate the facts that are necessary to evaluate the claim.'" *Hollier v. State Farm Mut. Auto. Ins Co.*, 01-0592, p. 4 (La. App. 4 Cir. 10/31/01), 799 So. 2d 793, 797, *quoting McClendon v. Economy Fire & Cas. Ins. Co.*, 98-1537, p. 7 (La. App. 3 Cir. 4/7/99); 732 So. 2d 727, 731. Merely opening a file on a claim does not satisfy the statutory requirements. *Holder*, 01-0592, p. 5, 799 So. 2d at 797.

Considering the conflicting testimony from Mr. Leopold Sher and Lafayette as to the date Lafayette received notice of Mr. Sher's claim, we cannot say that the jury was manifestly erroneous in accepting Mr. Leopold Sher's date. Thus, the jury determined that Lafayette did not initiate Mr. Sher's claim within the requisite thirty days due to the November 1, 2005, inspection date.

Building Damages Claim

Acknowledging that the Building suffered some wind damage due to Katrina, Lafayette asserts that it was not in bad faith because Mr. Sher did not submit sufficient evidence of all of the building damages claims. Additionally, Lafayette contends Mr. Scairono's estimates were not finalized. Lastly, Lafayette also maintains that the Building's damage was due to lack of maintenance.

Mr. Sher presented evidence that Lafayette inspected the Building in 1994, 2001, 2002, and 2003, during the Policy's term. All of the inspection reports contained documentation that Lafayette believed the property was well-maintained prior to Katrina.

Mr. Jones, the first adjuster, refused to assess damages to the basement level although Mr. Leopold Sher offered to show Mr. Jones the damage. Mr. Jones also testified that he did not assess the basement level. The record reflects that Mr. Leopold Sher repeatedly sent estimates and invoices to Lafayette to no avail.

Mr. Carubba testified that the Building was in very good condition considering its age. He stated that the Building cracked because it shook for two to three hours. Mr. Carubba testified that the cracks were white, which meant that the cracks were new and not made pre-Katrina.

Lafayette contends that Mr. Sher's building was not properly maintained. However, Mr. Vanderbrook,

a consulting engineer retained by Lafayette for inspection of the roof and interior of the Building, testified that he never said that damage was from a lack of maintenance. Mr. Vanderbrook also stated that he did not think the Building was poorly maintained. Lafayette also ignored a letter from its parent agent, Stone Insurance, Inc. ("Stone"), which stated that Stone believed that the damage surveyed was caused by wind driven rain, which was covered by the policy.

After reviewing the evidence, we find that the jury did not commit manifest error in finding that Lafayette failed to conduct a reasonable investigation into Mr. Sher's building damages. This is documented by Lafayette ignoring the letter from Stone, the multiple Lafayette inspection documents, which stated that the Building was well maintained, and by Mr. Jones refusing to survey the damage to the Building's basement level. As such, we do not find that the jury committed manifest error in finding that Lafayette was arbitrary and capricious when disputing Mr. Sher's claim regarding building damages.

Lost Rents Claim

Mr. Sher claimed the lost rents for three of the apartments in the Building, including Apartment E located in the basement level, at post-Katrina valuations. Lafayette contends that Mr. Sher cannot use post-Katrina valuations for this claim. However, the

Policy states that it covers the "actual loss of Business Income."

Both Mr. Sher and Mr. Leopold Sher testified as to the claim for lost rents. Mr. Sher rented two apartments post-Katrina for $1,400 each, resulting in his post-Katrina valuations. The only dispute regarded whether Mr. Sher was entitled to pre-Katrina or post-Katrina valuations. Therefore: Lafayette owed Mr. Sher $4,600 in undisputed lost rents. The record reflects that Lafayette never tendered payment to Mr. Sher for that $4,600. Lafayette failed to pay an undisputed portion of Mr. Sher's claim, which means that Lafayette is subject to penalties on Mr. Sher's entire claim pursuant to *Warner*. Regarding the testimony presented, we find no manifest error in the jury's decision regarding Lafayette's arbitrary and capriciousness towards Mr. Sher's claim for lost rents.

Business Personal Property Claim

Lafayette maintains that no bad faith exists as to Mr. Sher's claim for BPP because the Policy did not cover BPP and avers that Mr. Sher did not claim the BPP before litigation.

Mr. Sher asserts that whether his claim for BPP was disputed in good faith is irrelevant due to the fact that the failure to pay lost rents and property damage was in bad faith, which dictates that the trial court assess penalties on Mr. Sher's entire claim pursuant to *Warner*. We find that this argument has

merit and pretermit a discussion on the dispute over BPP.

Flood Claim

Lafayette states that no Louisiana state court has found that flood damage is covered by a "non-flood policy." Mr. Sher states that the flood claim is a "non-issue" because the lost rents and property damages were not disputed in good faith. We pretermit the discussion as it is moot since we find that the trial court correctly granted Mr. Sher's motion for partial summary judgment regarding the ambiguity of the water exclusion.

Accordingly, we find that the jury did not commit manifest error in finding that Lafayette was arbitrary, capricious, or without probable cause when it handled and denied Mr. Sher's claims under the Policy.

L.A. R.S. 22:658: Payment and adjustment of claims, policies other than life and health and accident; personal vehicle damage claims; penalties; arson-related claims suspension

Lafayette asserts the trial court erred by applying and submitting to the jury the amended version of La. R.S. 22:658 effective at the time of trial. The amended version of La. R.S. 22:658(B)(1) increased penalties from twenty-five percent to fifty percent and added the award of attorney's fees and costs for

arbitrarily and capriciously refusing to pay a claim within thirty days. The pre-amendment version of La. R.S. 22:658 read, in pertinent part, as follows:

> B. (1) Failure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor or failure to make a written offer to settle any property damage claim, including a third-party claim, within thirty days after receipt of satisfactory proofs of loss of that claim, as provided in Paragraphs (A)(1) and (4), respectively, or failure to make such payment within thirty days after written agreement or settlement as provided in Paragraph (A)(2), when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of twenty-five percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater, payable to the insured, or to any of said employees, or in the event a partial payment or tender has been made, twenty-five percent of the difference between the amount paid or tendered and the amount found to be due.

The jury instruction regarding La. R.S. 22:658 was jointly submitted in its amended form to the trial court. However, Lafayette objected to the use of the amended form at trial.

"A trial judge has a duty to give instructions which properly reflect the law applicable in light of

the facts of the particular case." *Berthelot v. Stallworth*, 03-1771, p. 8 (La. App. 4 Cir. 9/14/04), 884 So. 2d 648, 653. Therefore, the trial court has a duty to present the correct law to the jury regardless of joint stipulated jury instructions. Louisiana Revised Statutes are not applied retroactively "unless it is expressly so stated." La. R.S. 1:2. Regarding retroactivity, the Louisiana Civil Code provides guidance La. C.C. art. 6, which reads:

> In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretive laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary.

As La. R.S. 22:658 contains no language regarding retroactivity, we must determine whether La. R.S. 22:658's penalty percentage, attorney's fees, and cost awards constitute substantive or procedural changes. *Patriot Am. Hospitality P'ship, LP v. Mississippi Land Holdings, Inc.*, 06-0601, p. 5 (La. App. 4 Cir. 12/13/06), 948 So. 2d 249, 252, *citing Davis v. Willis-Knighton Med. Ctr.*, 32,193, p. 3 (La. App. 2 Cir. 8/18/99), 738 So. 2d 1191, 1193.

A statutory amendment changing the percentage of permitted penalties is substantive and cannot be applied retroactively. *Francis v. Travelers Ins. Co.*, 581 So. 2d 1036, 1044 (La. App. 1st Cir. 1991). "Therefore, the time when the right to the penalty

comes into existence determines which penalty percentage applies." *Id., citing Gulf Wide Towing, Inc. v. F.E. Wright (U.K.) Ltd.*, 554 So. 2d 1347 (La. App. 1st Cir. 1989). "The right to a penalty comes into existence after the passage" of the time period provided by the statute. *Francis*, 581 So. 2d at 1354. Although the parties dispute the exact date Lafayette received notice of Mr. Sher's claim, it is undisputed that the thirty-day time period passed prior to the 2006 amendment to La. R.S. 22:658.

Thus, we find the trial court committed legal error by applying the amended version of La. R.S. 22:658. The trial court applied a fifty percent penalty and awarded $184,538.50 in penalties pursuant to La. R.S. 22:658. Therefore, the pre-amendment version of La. R.S. 22:658, which allowed for a twenty-five percent penalty, applies and the amount of penalties awarded to Mr. Sher is reduced to $92,269.25.

ATTORNEY'S FEES

Lafayette asserts that the trial court erred in awarding $258,728 in attorneys fees pursuant to La. C.C. art. 1997 and/or La. R.S. 22:658. As discussed above, if the attorney's fees were awarded based on La. R.S. 22:658, then we must eliminate the award for lack of retroactivity. However, the award of attorney's fees may have a basis in La. C.C. art. 1997.

"An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence

of his failure to perform." La. C.C. art. 1997. The prevailing Louisiana principle states that "the right to recover attorney fees must be expressed by a statute or a contract." *Ratcliff v. Boydell*, 93-0362, 92-0630 (La. App. 4 Cir. 4/3/96), 674 So. 2d 272, 282. *See also* La. R.S. 22:1220. However, this Court opined that "attorney fees are not provided for in article 1997." *Priority E.M.S. v. Crescent City E.M.S.*, 01-2171, p. 18 (La. App. 4 Cir. 10/16/02), 829 So. 2d 1066, 1077. "Attorney's fees are not allowable in an action for breach of contract unless there is a specific provision therefor in the contract" *Rye v. Terminix Serv. Co., Inc.*, 423 So. 2d 754, 757 (La. App. 4th Cir. 1982). "[P]arties have an opportunity to stipulate in the contract that attorneys fees would be due in the event the contract is breached." *Id.*

In the case *sub judice*, Lafayette and Mr. Sher did not include a provision in the Policy to award attorney's fees in case of a breach. Likewise, La. C.C. art. 1997 does not provide for the award of attorney's fees. Finally, because we find that La. R.S. 22:658 cannot be applied retroactively, we vacate the trial court's award of $258,728 in attorney's fees.

LEGAL INTEREST

The trial court awarded Mr. Sher interest from the date of judicial demand on damages and penalties. Lafayette avers that no legal interest should be permitted. However, if this Court finds legal interest

applicable, Lafayette contends that it should be calculated from the date of judgment.

The timeline applicable for awarding legal interest is bifurcated based upon whether the award is for damages or attorney's fees/penalties. Interest on damages is calculated from the date of judicial demand. *Sharbono v. Steve Lang & Son Loggers*, 97-0110 (La. 7/1/97), 696 So. 2d 1382, 1386. This prejudgment interest "is meant to fully compensate the injured party for the use of funds to which he is entitled but does not enjoy because the defendant has maintained control over the funds during the pendency of the action." *Id.* "However, 'penalty interest is entirely of the post-judgment variety, and thus is calculated only from the date the penalties are awarded until the date they are paid.'" *Overton*, 05-1001, p. 23, 937 So. 2d at 418, *quoting Sharbono*, 97-0110, 696 So. 2d at 1389. *See Becnel v. Lafayette Ins. Co.*, 99-2966, p. 13 (La. App. 4 Cir. 11/15/00), 773 So. 2d 247, 254.

Therefore, we find that interest is owed from the date of judicial demand on Mr. Sher's damage award of $351,727 and from the date of judgment on the penalty assessment of $92,269.25.

COSTS

Lafayette asserts there is no legal basis for the trial court's award of $42,020.24 in costs pursuant to La. C.C.P. art. 970 if this Court reduces Mr. Sher's awards to less than twenty-five percent more than his

offer of judgment. La. C.C.P. art. 970 provides that costs may be awarded to the prevailing party by the trial court if the final amount awarded is at least twenty-five percent greater "than the amount of the offer of judgment made by the plaintiff-offeror." La. C.C.P. art. 970. "[T]he offeree must pay the offeror's costs, exclusive of attorney fees, incurred after the offer was made, as fixed by the court." La. C.C.P. art. 970.

Mr. Sher made an offer of judgment on Lafayette on February 9, 2006, for $225,000 "inclusive of costs, interest, attorney fees and any other amount which may be awarded Plaintiff against Lafayette in this matter." Lafayette refused the offer. Considering the amount owed by Lafayette, "inclusive of costs, interest, attorney fees and any other amount," after this Court's adjustments exceeds Mr. Sher's offer of judgment by at least twenty-five percent, we find no error in the award of documented costs pursuant to La. C.C.P. art. 970.

DECREE

Accordingly, we find that the trial court correctly granted Mr. Sher's motion for partial summary judgment in finding the water exclusion ambiguous. We find that the trial court did not commit legal error in striking additional defenses not specifically pled by Lafayette. Further, we do not find the jury committed manifest error in the awards for BPP, lost rents, or building damages. The trial court also properly

refused to admit jury instructions regarding damages for mental anguish. The jury did not commit manifest error by determining that Lafayette acted arbitrary, capricious, and without probable cause by refusing to pay Mr. Sher's claim. However, we find that the trial court erred by applying La. R.S. 22:658 retroactively and awarding attorney's fees. The trial court also erred in awarding legal interest on penalties from the date of judicial demand. The trial court did not err in awarding costs pursuant to La. C.C.P. art. 970.

Thus, the awards are amended as follows:

Building Damage Above the Basement	$ 175,850
Building Damage in the Basement	$ 144,300
Lost Rents	$ 17,350
Business Personal Property	$ 31.577
Penalties Pursuant to La. R.S. 22:658	$ 92,269.25
TOTAL	$461,346.25

Costs Pursuant to La C.C.P. art. 1920	$16,288.60
Costs Pursuant to La. C.C.P. art 970	$42,020.24
Attorney's Fees Pursuant to La. C.C. art. 1997 and/or La. R.S. 22:658	$ 0000.00
TOTAL	$58,308.84

Lastly, legal interest is due from the date of judicial demand on the damage award and from the date of judgment on penalties.

AMENDED IN PART, AFFIRMED AND RENDERED AS AMENDED

JOSEPH SHER	*	**NO. 2007-CA-0757**
VERSUS	*	**COURT OF APPEAL**
LAFAYETTE INSURANCE COMPANY; UNITED FIRE & CASUALTY COMPANY; THE UNITED FIRE GROUP; ROBERT JONES; WES SWANK; FRED VANDERBROOK; AND PROPERTY LOSS CONSULTING, INC.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

* * * * * *

MURRAY, J., CONCURS IN THE RESULT

JOSEPH SHER	*	**NO. 2007-CA-0757**
VERSUS	*	**COURT OF APPEAL**
LAFAYETTE INSURANCE COMPANY; UNITED FIRE & CASUALTY COMPANY; THE UNITED FIRE GROUP; ROBERT JONES; WES SWANK; FRED VANDERBROOK; AND PROPERTY LOSS CONSULTING, INC.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

* * * * * *

TOBIAS, J., CONCURS IN THE RESULT AND ASSIGNS REASONS.

I respectfully concur in the result. Although I reach the same conclusions as the majority, I reach them differently because I disagree with the majority's analysis of the law and facts.

The Term "Flood".

I find the trial court's granting of the plaintiff's partial motion for summary judgment is error. I do not read the word "flood" in the contract of insurance as ambiguous at all. Rather, it is clear that the word "flood" applied to any and all floods.

The precise language in the contract of insurance excluding damages caused by flood is contained in paragraph **B., Exclusions**, subpart **1.g. Water (1)**, to-wit:

> Flood, surface water, waves, tides, tidal waives [sic], overflow of any body of water, or their spray, all whether wind driven by wind or not; . . . .

In context, it is clear that "flood" includes flood from any source whatsoever, including surface water, waves, et cetera. The greater includes the lesser. By analogy, in the sale of real estate, over time, authentic acts of sale of immovables evolved to frequently say, "I hereby grant, bargain, sell, convey, transfer, assign, set over, abandon and deliver. . . ." No rational court today would hold that string of verbiage to be any different than if the vendor simplysaid. "I hereby sell. . . ."

Ultimately, however, the result in the case at bar is no different whether the majority or the trial court is correct or not in saying that flood does not include manmade floods. This is because Mr. Sher's premises sustained wind and water damage *first* from the force of the wind and rain of Hurricane Katrina. One may reasonably take judicial notice of this fact. La. C.E. art. 201. After the winds had settled down and the rain slacked, the levees broke and inundated large portions of the city of New Orleans, including 1410 Broadway Street. From this follows the assumption that wind and rain caused damages to the interior of Mr. Sher's property, including the basement area, prior to the flood. The subsequent flood caused additional damage to the basement. But what portion of the damage to the basement was caused by wind and wind driven rain and what portion was caused by flood? This is a question of fact for the trier of fact, whether jury or judge.

Further, I take judicial notice that water evaporates, especially in heat. *Id.* In the days following Hurricane Katrina, water from the wind-driven rain and the flood waters (which included brackish and/or salt water) evaporated within Mr. Sher's property. But which water (rain or flood) caused what damage? Again, that is a question of fact for the trier of fact.

Nor should one automatically read a "concurrent causation" clause in a contract of insurance as an excuse for an insurer, such as one in the position of Lafayette Insurance Company ("Lafayette"), as an

automatic ground to exclude coverage under a windstorm insurance contract. Again, a question of fact may exist, at least in the following context: Did the wind and rain cease or subside to a sufficient extent that the subsequent flood, although perhaps related to the wind and rain, constitutes a separate event such that reasonable minds could view them as nonconcurrent?

In the case at bar, I can argue that the trial court's making a determination in advance of trial by the ruling on the motion for partial summary judgment that the term "flood" interdicted the jury's verdict so that this court would be required to conduct a *de novo* review of the record. *Anderson v. New Orleans Public Service, Inc.*, 583 So.2d 829 (La. 1991). In such a context, this court would be required to disregard the jury's verdict entirely and render judgment on the record on appeal.

I have conducted such a *de novo* review, and cannot say to an absolute certainty that the dollar amount of damages that I reach is different from that of jury. Reasonable minds differ. Accordingly, I do not disagree with the majority's affirmation of the quantum of damages.

Pleading of Affirmative Defenses

I respectfully disagree with the majority's conclusion that Lafayette did not adequately plead its affirmative defenses. As the majority notes, Lafayette's answer asserted the following:

> Lafayette adopts the terms, conditions, coverages, exclusions and endorsements of its policy, as if copied herein in extensio [sic], as a defense to petitioner's claims; Lafayette further pleads all defenses, exclusions, rights and remedies under the policy of insurance issued by Lafayette to petitioner.

La. C.C.P. art. 1005 defines affirmative defenses as follows:

> The answer shall set forth affirmatively arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, division, duress, error or mistake, estoppel, extinguishment of the obligation in any manner, failure of consideration, fraud, illegality, injury by fellow servant, transaction or compromise, and any other matter constituting an affirmative defense. If a party has mistakenly designated an affirmative defense as an incidental demand, or an incidental demand as an affirmative defense, and if justice so requires, the court, on such terms as it may prescribe, shall treat the pleading as if there had been a proper designation.

Article 1006 of the Louisiana Code of Civil Procedure defines alternative defenses:

> An answer may set forth two or more defenses in the alternative, even though the factual or legal bases thereof may be inconsistent or mutually exclusive. All allegations

in such cases are made subject to the obligations set forth in Article 863.

Our Code of Civil Procedure is crystal clear that "[n]o technical forms of pleading are required." La. C.C.P. art. 854.

In my view, the paragraph of Lafayette's answer pleading the policy provisions as a defense is sufficient to raise all of the defenses that Lafayette needed to raise. That is, but for the contract of insurance between Joseph Sher and Lafayette, Mr. Sher would have no cause of action against Lafayette. Further, the precise language of La. C.C.P. art. 1005 does not list a policy of insurance as are item that must be specially pled as an affirmative defense. Accordingly, I find that *Dixie Savings & Loan Ass'n v. Pitre*, 99-154, (La. App. 5 Cir. 7/27/99), 751 So.2d 911, relied upon by the majority and holding that the pleading of a policy of insurance "in extenso" does not meet the requirement of asserting an affirmative defense, as an incorrect statement of law. Rather, *Brantley v. State Farm Ins. Co.*, 37,601, (La. App. 2 Cir. 1/28/04), 865 So.2d 265, which held to the contrary of *Dixie Savings*, appears to me to be a more accurate statement of the law.[1]

In the alternative, I find that Lafayette's defense that its policy does not provide business personal property loss coverage was a negative defense and not

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[1] A conflict in the circuit courts of appeal exists on this point of law.

an affirmative defense that Lafayette needed to specially plead. For example, it *Keller v. Amedeo*, 512 So.2d 385 (La. 1987), the Supreme Court granted certiorari to determine whether, in an underinsured motorist case, the existence of additional liability insurance coverage covering the alleged underinsured motorist constituted an affirmative defense, which the UM carrier was required to set forth in its answer. In ruling that it did not, the Court distinguished between a "negative defense" and an "affirmative defense," stating that the latter raises a new matter, which, assuming the allegations in the petition to be true, constitutes a defense to the action and has the effect of defeating a plaintiff's demand on the merits. The Court further noted that, because the claimant must plead and prove lack of insurance in order to recover in a UM case, the UM carrier's attempt to disprove this fact neither raised a new matter (a matter not raised by the plaintiff's petition) nor constituted a defense that assumes the plaintiff's allegations to be true; rather, it was a negative defense, which sought to disprove an essential element of the claimant's theory of the case. *See also Alexander v. Cornett*, 42,147, p. 9 (La. App. 2 Cir. 7/11/07), 961 So.2d 622, 628.

By comparison, in the instant case, Mr. Sher pled in his petition, among other things, that he sustained damages to his business personal property, which damages he claimed were covered by the policy issued to him by Lafayette. In its answer, Lafayette

acknowledged the existence of such a policy, and further pled, the policy, in its entirety, as a defense and/or limit to Mr. Sher's ability to recover business personal property losses under the policy. Because Mr. Sher is charged with the burden of establishing every essential fact and to establish that his claim is within the policy's coverage (*see Mercadel v. Tran*, 92-0798 (La. App. 4 Cir. 3/29/94), 635 So.2d 438, 440), including his right to recover business personal property losses. Lafayette's attempt to disprove business personal property coverage by asserting the terms and conditions of the policy did not raise a new matter or constitute a defense that assumes Mr. Sher's allegations to be true, but merely sought to disprove Mr. Sher's allegations that the Lafayette policy covers his alleged business personal property losses. Therefore, Lafayette's defense that the policy it issued to Mr. Sher does not cover business personal property losses was not an affirmative defense Lafayette needed to specially plead; it was a negative defense that merely sought to disprove an essential element of Mr. Sher's theory of his case, *i.e.*, coverage for loss to his business personal property.

Nonetheless, whether determined to be a "negative defense" or "affirmative defense," the outcome remains the same. As I read the applicable policy provisions (quoted by the majority), because Lafayette's all-risk policy did not specifically exclude coverage for business personal property losses, I find that coverage was afforded under the policy as written.

Overhead and Profit

Lafayette complains that an award of 45% for overhead and profit is excessive. Actually, the 45% consists of 25% for overhead and profit and an additional 20% for contingencies. I agree with the majority that based upon the facts of this case, 25% for overhead and profit was not (is not) excessive in the post-Hurricane Katrina period when finding competent contractors has been/was difficult. Moreover, assigning 20% for contingencies and embracing expert testimony on that fact is not unreasonable and is within the trier of fact's discretion. The costs of material and labor in the post-Hurricane Katrina environment is not certain and can rise and fall with the scarcity or surplusage of either or both; unknown damage ("hidden from an inspector's view) and discovered once repairs commence can be included in projected expenses of repairs. I do not find that the majority is incorrect in assessing such amounts against the plaintiff.

Water Hammer

From the record on appeal, I cannot say that water hammer effects were or were not present and that a trier of fact, myself included, could award such damages in this case. Lafayette need not have pleaded same as an affirmative defense, instead relying upon the language of their policy of insurance.

Structural Damage

From the jurisprudence, a trier of fact has the discretion to believe or not believe whether structural damage was proven as existing more likely than not. As noted by the concurring opinion in *Grefer v. Alpha Technical*, 02-1237, (La. App. 4 Cir. 3/31/05), 901 So.2d 1117, the Louisiana Supreme Court affirmed an award of damages for contamination of a water aquifer when no evidence was present in the record that the aquifer had been contaminated by the defendant's operations. *See Corbello v. Iowa Production*, 02-0826, (La. 2/25/03), 850 So.2d 686. If such by the law, a trier of fact does not err in awarding such damages and I find that the damages should be awarded on this record on appeal.

In sum, I respectfully concur in the result.

JOSEPH SHER	* **NO. 2007-CA-0757**
VERSUS	* **COURT OF APPEAL**
LAFAYETTE INSURANCE COMPANY; UNITED FIRE & CASUALTY COMPANY; THE UNITED FIRE GROUP; ROBERT JONES; WES SWANK; FRED VANDERBROOK; AND PROPERTY LOSS CONSULTING, INC.	* **FOURTH CIRCUIT** * **STATE OF LOUISIANA**

* * * * * * *

CANNIZZARO, J., CONCURS IN PART AND DISSENTS IN PART

Flood Coverage

I respectfully dissent from the majority's failure to reverse the trial court judgment granting partial summary judgment in favor of the plaintiff, Mr. Sher, on the issue of flood damage coverage.

Specifically, I find no merit in the majority's conclusion that the term "flood" as utilized in the policy at hand is susceptible to different meanings thereby rendering the water damage exclusion inapplicable. The policy issued to the plaintiff by the defendant, Lafayette Insurance Company, provides in Paragraph B, Section (g)(1), relative to "Water Exclusions", that the defendant "***will not pay for loss or damage caused*** directly or indirectly ***by any*** **of the following**. Such loss or damage is excluded

regardless of any other cause or event . . . [:] ***[f]lood***, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all driven by wind or not. [Emphasis added.]" Based upon my review, the term "flood", as well as the entirety of the exclusion, is clear and unambiguous. See, *Stewart Interior Contractors, L.L.C. v. Metalpro Industries, L.L.C.*, 07-0251 (La. App. 4 Cir. 10/10/07), ___ So.2d ___ ("Courts are not at liberty to alter the terms of insurance policies that are unambiguous."). See also, La. C.C. art. 2046 ("When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent.") and La. C.C. art. 2049 ("The words of a contract must be given their generally prevailing meaning.").

The majority's analysis of the water damage exclusion is flawed in two respects. First, the majority errs in its conclusion that Section (g)(1) provides a restrictive list of the only events that constitute "floods". Next, the majority correctly notes that "flood" is not defined within the policy and, as such, must be given its generally prevailing meaning. However, rather than accepting the term in its traditional context and as clearly written, the majority rendered the exclusion ineffective on the basis there are "varying causes of floods."

The evidence clearly establishes Section (g)(1) was not intended in any way to be a definition of the word "flood". The clear wording of the provision states that the defendant will not compensate the plaintiff

for "***any***" flood loss or damage, regardless of causation. Had the insurer intended to restrict the definition of the term) "flood" to certain events, it would have provided a restrictive definition of the word in the "Definitions" section of the policy, not in an exclusion.[1] It is unclear why the majority places emphasis on causation as the definitive criteria. Nonetheless, it is my steadfast conclusion that the origin of the flood, whether man-made or otherwise, is of no consequence due to the clarity and unambiguousness of the water damage exclusion. See, *Wickramasekra v. Associated Intern. Ins. Co.*, 02-2474 (La. App. 4 Cir. 6/25/03), 890 So.2d 569, 573 ("[C]ourts have no authority to alter the terms of policies under the guise of contractual interpretation when the policy provisions are couched in unambiguous language.").

The evidence adduced in support of the partial summary judgment does not establish beyond dispute the ambiguity of the water exclusion and, as such, that the plaintiff was entitled to flood coverage. *Schroeder v. Bd. of Supervisors of La. State Univ.*, 591 So.2d 342, 345 (La. 1991) ("Because the mover has the burden of establishing that no material factual issue exists, *inferences to be drawn from the*

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[1] Nor do I find majority's reliance on La. R.S. §29:723, relative to the Homeland Security and Emergency Assistance and Disaster Act, to be applicable under the facts. While the provision provides examples of types of disasters, it provides no guidance to the use of the word "flood" relative to the case at hand and, particularly, to the policy issued by the defendant (i.e., contract between the parties.).

underlying materials before the court must be viewed in the light most favorable to the party opposing the motion [for summary judgment]. [Emphasis added]"). Consequently, the plaintiff failed to demonstrate that he was entitled to a judgment as a matter of law, and, as a result, the partial motion for summary judgment was erroneously granted.[2] Moreover, the lower court erred in awarding penalties to the plaintiff based on its improper determination that the defendant was arbitrary, capricious and without probable cause when it disputed the plaintiff's flood claim.

Pleading of Affirmative Defenses and Business Personal Property Coverage

The defendant complains the trial court erred in precluding it from presenting defenses, with the exception of the water exclusion and payments made under the NFIP policy, on the basis that the exclusions were not specifically pled as affirmative defenses. The defendant only addressed in brief the trial court's failure to allow it to defend coverage claims for wind driven rain that entered through the

[2] For argument sake, even if the meaning of flood was limited to "natural", and not "man made", events, the lower court erred in granting summary judgment because there were genuine issues of fact with respect to the cause of the water inundation of the plaintiff's property (i.e., causation of levee breakage).

plaintiffs windows and damages associated with the "water hammer" effect.[3]

It is undisputed that reliance upon an exclusion in an insurance contract is considered to be an affirmative defense, which must be set forth in an answer to a petition since it raises a new matter constituting a defense to an action. La. C.C.P. art. 1005; *Tudury v. Cooperative Cab Co.*, 265 So.2d 307 (La. App. 4th Cir. 1972). I agree with the majority's general proposition that, as to those defenses that constituted new matters not raised in the plaintiff's petition, the defendant's answer containing broad based denials and assertions did not establish an adequate pleading of affirmative defenses as mandated by La. C.C.P. art. 1005.[4]

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[3] Notably, the majority does not specifically address the trial court's failure to permit the defendant from asserting a defense to the wind driven rain claim.

[4] There is sparse jurisprudence, and none of which can be considered controlling, on the issue of the sufficiency of general denials of coverage and assertions of exclusions via the pleading of an insurance policy *in extenso* in answers to petitions. At first glance, it may appear there is a conflict in the circuits on the issue of whether a pleading of an insurance policy *in extenso* meets the requirement of asserting an affirmative defense.

The majority correctly relies on *Dixie Savings & Loan Ass'n v. Pitre*, 99-154 (La. App. 5 Cir. 7/27/99), 751 So.2d 911, for the proposition that the pleading of policy of insurance *in extenso* does not meet the affirmative defense mandate. In *Dixie*, the defendant asserted a broad based general defense in its answer without reference to any particular exclusion. Specifically, the defendant urged in his answer the "policy is its own best evidence

(Continued on following page)

Applying this principle of law, I conclude the trial court mistakenly barred the defendant from contesting the claims relative to the wind driven rain and "water hammer" effect. The defendant sought to exclude these claims pursuant to Paragraph B, Section (g)(1), pertinent to "Water Exclusions", which is the same provision the trial court permitted the defendant to rely on to exclude flood coverage. Logically, the defendant did not have to plead an affirmative defense to the wind driven rain and "water hammer" effect claims since the water exclusion in the policy was already properly raised by the

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and the provisions, exclusions, and limitations therein are pled herein as though copied in extenso." The court of appeal affirmed the trial court ruling precluding the defendant from asserting several defenses since they were not specifically raised as affirmative defenses in the defendant's answer.

It appears in the case of *Brantley v. State Farm Ins Co.*, 37-601 (La App. 2 Cir. 1/28/04), 865 So.2d 265 that a result similar to *Dixie* was suggested. In *Brantley*, the defendant's answer to the petition provided "defendant asserts all defenses under the policy, *including failure to cooperate, fraud, abandonment of the property and no inhabitants for 30 days before fire.* [Emphasis added]." The plaintiffs sought appellate review of the denial of their motion to strike premised on the inadequacy of the defendant's answer for failure to assert the affirmative defenses of failure to cooperate and abandonment. Without citing reasons, the court found the answer was sufficient to deny the plaintiffs relief as to their motion to strike.

Thus, it may be logically concluded the qualifying language as to the specific defenses at issue that accompanied the general denial in *Brantley* was the pivotal factor for the sufficiency of the answer. Similar qualifying language was not present in the *Dixie* case and, thus, I conclude differentiates the two cases.

defendant and, as such, did not constitute a new matter not addressed in the petition.

For a different reason, I find the majority erred in its application of the rule relative to the pleading of affirmative defenses to the defendant's objection to the business personal property loss coverage. The plaintiff alleged the defendant issued a policy of insurance which entitles him to business personal property loss coverage for sustained damages. Specifically, he urged there was no evidence he rejected the property loss coverage. As a result, the plaintiff had the burden of establishing the facts that support his claim for policy coverage. While the defendant acknowledged the existence of the policy as a whole, it disputed the policy encompassed the coverage, not based on an exclusion, but rather as to the policy upon receipt from the underwriter. To disprove the claim, the defendant had to rely on the same policy terms, conditions, and declarations page the plaintiff relied on to seek recovery. By denying the plaintiff was not insured for property loss coverage, the defendant did not raise any new issues not encompassed by the petition that would implicate the applicability of La. C.C.P. art. 1005. See, *Wimberly v McCoy Tree Surgery Co.*, 33,761 (La. App. 2 Cir. 8/25/00), 766 So.2d 729 (crucial factor for the court was the fact both parties referred to the same coverage as defined in the policy, and not any special exclusions that might apply).

Regardless of my opposition to the majority's finding regarding the pleading of the defense of

business personal property coverage, I nevertheless conclude the outcome would be the same. A review of the record indicates that the policy does provide coverage for business personal property losses. Therefore, I concur in the result.

Lost Rents

I agree with the majority that the plaintiff is entitled to post-Katrina valuation of lost rents. However, only insofar as it applies to Apartments A and C, which did not sustain flood damage. Based on my determination of the absence of flood coverage under the policy, the jury was manifestly erroneous in awarding loss rent for flood damage sustained to Apartment E. Nor do I find the defendant was arbitrary or capricious in disputing this claim, thereby rendering the imposition of penalties inappropriate.

Building Damages

I affirm the majority's finding of the lack of manifest error or abuse of discretion in the jury's assessment of damages for overhead and profit and structural damage, as well as affirm the imposition of penalties for the defendant's arbitrary and capricious conduct when disputing these claims. As to the "water hammer" effect claim, I can not say from the record what damages, if any, were awardable, in light of the trial courts erroneous failure to permit the defendant to present a defense. However, the defendant was not arbitrary or capricious in disputing these damages

due to its inability to present a defense. Thus, the imposition of penalties relative to the "water hammer" effect was inappropriate.

Penalties, Attorney's Fees, Legal Interest and Costs

As stated, I disagree with the assessment of penalties against the defendant under La. R.S. 22:658 for alleged arbitrary and capricious conduct as to the issues of flood coverage, Apartment E lost rentals, and the "water hammer" effect. In all other respects, I affirm the award of penalties for the defendant's arbitrary and capricious conduct and, as to those limited instances, the majority's application of the pre-amended version of La. R.S. 22:658 imposing a twenty-five (25%) penalty.

Nor do I dispute the majority's reversal of the award of attorney's fees. It is well recognized in the jurisprudence that as a general rule attorney's fees are not allowed except where authorized by statute or contract. *Maloney v. Oak Builders, Inc.*, 235 So.2d 386 (La. 1970).

In all other respects, I would affirm the judgment of the trial court. Finally, as to those issues wherein I affirmed the majority's award of damages, I also subscribe to the imposition of legal interest and costs.

No. 07-713

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IN THE

Supreme Court of the United States

GLADYS CHEHARDY, DANIEL FONTANEZ, JACQUELYN FONTANEZ, LARRY FORSTER, GLENDY FORSTER, *et al.*,

Petitioners,

v.

ALLSTATE INDEMNITY COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT STATE FARM FIRE AND CASUALTY COMPANY

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QUESTION PRESENTED

Did the Fifth Circuit act within its sound discretion in declining to certify to the Louisiana Supreme Court the question of whether the water damage exclusions in Plaintiffs' insurance policies excluded flood damage resulting from levee breaches during Hurricane Katrina?

CORPORATE DISCLOSURE STATEMENT

Respondent State Farm Fire and Casualty Company is a wholly owned subsidiary of State Farm Mutual Automobile Insurance Company. State Farm Mutual Automobile Insurance Company is a mutual insurance company and has no parent company.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT OF CASE 1

REASONS FOR DENYING THE WRIT 4

I. THE FIFTH CIRCUIT PERMISSIBLY EXERCISED ITS DISCRETION IN DECLINING TO CERTIFY THE QUESTION OF THE INTERPRETATION OF THE WATER DAMAGE EXCLUSIONS TO THE LOUISIANA SUPREME COURT 6

II. A GRANT-VACATE-REMAND ORDER IS INAPPROPRIATE IN THIS CASE 12

III. THE FIFTH CIRCUIT CORRECTLY HELD THAT THE WATER DAMAGE EXCLUSIONS IN THE POLICIES AT ISSUE UNAMBIGUOUSLY EXCLUDE ALL FLOOD DAMAGE 14

CONCLUSION 17

TABLE OF AUTHORITIES

Cases **Page(s)**

Arias-Benn v. State Farm Fire & Casualty Insurance Co., 495 F.3d 228 (5th Cir. 2007) 8

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 7

Bellotti v. Baird, 428 U.S. 132 (1976) 7

Boston Old Colony Insurance Co. v. Tiner Associates Inc., 288 F.3d 222 (5th Cir. 2002) 8

Branch-Hines v. Hebert, 939 F.2d 1311 (5th Cir. 1991) 5

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) ... 8-9

Chevron USA, Inc. v. Vermilion Parish School Bd., 377 F.3d 459 (5th Cir. 2004) 11

Citizen Comm. For Better Law Enforcement v. Lafayette, 685 So. 2d 289 (La. Ct. App. 1966) 10

Commercial Union Insurance Co. v. Advance Coating Co., 351 So. 2d 1183 (La. 1977) 15

FDIC v. Abraham, 137 F.3d 264 (5th Cir. 1998) 10-11

Fiess v. State Farm Lloyds, 392 F.3d 802 (5th Cir. 2004) 10

Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976) 9

Harrison v. NAACP, 360 U.S. 167 (1959) 7

Huddleston v. Dwyer, 322 U.S. 232 (1944) 13

Jesco Construction Corp. v. Nationsbank Corp.,
278 F.3d 444 (5th Cir. 2001)..... 10

In re Katrina Canal Breaches Consolidated Litigation, 495 F.3d 191 (5th Cir. 2007)..... *passim*

Lawrence v. Chater, 516 U.S. 163 (1996)..... 12, 13

Lehman Brothers v. Schein, 416 U.S. 386 (1974)..... 7, 8, 11

Lords Landing Village Condominium Council of Unit Owners v. Continental Insurance Co.,
520 U.S. 893 (1997)..... 12

OneBeacon Insurance Co. v. Don's Building Supply, Inc., 496 F.3d 361 (5th Cir. 2007)..... 10

Prytania Park Hotel, Ltd. v. General Star Indemnity Co.,
179 F.3d 169 (5th Cir. 1999)..... 8

Rescue Army v. Municipal Court of Los Angeles,
331 U.S. 549 (1947)..... 7

Sher v. Lafayette Insurance Co., No. 2007
-CA-0757, 2007 WL 4247708
(La. Ct. App. Nov. 19, 2007) ..... *passim*

St. Paul Fire & Marine Insurance Co. v. Barry,
438 U.S. 531 (1978)..... 8

Swearingen v. Owens-Corning Fiberglass Corp.,
968 F.2d 559 (5th Cir. 1992)..... 9

Thermo Terratech v. GDC Enviro-Solutions, Inc., 265 F.3d 329 (5th Cir. 2001) 8

Thomas v. American Home Products, Inc., 519 U.S. 913 (1996) 12

Times-Picayune Publishing Corp. v. Zurich American Insurance Co., 421 F.3d. 328 (5th Cir. 2005) 8

Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) 7

Transcontinental Gas Pipeline Corp. v. Transportation Insurance Co., 958 F.2d 622 (5th Cir. 1992) 8-9

Williamson v. Elf Aquitaine, Inc., 138 F.3d 546 (5th Cir. 1998) 9

Statutes and Rules **Page(s)**

15 U.S.C. § 1011 8

28 U.S.C. § 1292(b) 2

Federal Rule of Civil Procedure 12(b)(6) 1

Supreme Court Rule 10 6

STATEMENT OF CASE

Plaintiffs-Petitioners ("Plaintiffs") are putative representatives of a class of residents of Orleans, Jefferson, and St. Bernard parishes whose properties sustained flood and other damage during Hurricane Katrina. Plaintiffs were issued homeowners or other property insurance policies by Defendant-Respondent State Farm Fire and Casualty Company ("State Farm") and the other defendant insurers. State Farm's policies, like the policies issued by the other insurers, exclude damage caused by flood, waves, tidal water, the overflow of a body of water, and other water perils. State Farm's policies also contain lead-in language providing that the exclusions apply regardless of the cause of the excluded event.

Plaintiffs filed suit in Louisiana state court, contending that the damage to their properties was covered by their policies notwithstanding the water damage exclusions. In support of their claims, Plaintiffs allege that the flooding of New Orleans and the surrounding parishes was caused by the negligent design, construction, or maintenance of the levees and other flood-control systems and that the use of the term "flood" in the water damage exclusions in their policies is ambiguous and does not cover "man-made" flooding.

Plaintiffs' case was removed to the United States District Court for the Middle District of Louisiana. The case was subsequently transferred to the Eastern District of Louisiana and consolidated with related cases for pretrial proceedings before the Honorable Judge Stanwood R. Duval, Jr. State Farm and other insurer defendants moved to dismiss Plaintiffs' claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, asserting, *inter alia*, that the damage to Plaintiffs' properties was not covered due to the unambiguous water damage exclusions in the policies.

The District Court issued an Order dated November 27, 2006, granting State Farm's motion to dismiss but denying those of the other insurer defendants. The District Court

ruled that the term "flood" as used in the water damage exclusions was ambiguous because it did not specify whether it referred only to naturally-occurring floods or also to floods caused by man-made events or human negligence. Given this perceived ambiguity, the Court held that the term flood must be interpreted narrowly in favor of the policyholder to mean only naturally-occurring floods, thus creating coverage for man-made flooding. However, the District Court granted State Farm's motion to dismiss, holding that the lead-in language to the water damage exclusion in State Farm's policies resolved any ambiguity and clearly excluded flood damage regardless of the cause of the flooding. (Appendix to the Petition ("App.") 150-51).

The District Court certified its Order *sua sponte* for interlocutory appeal to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1292(b). The other insurer defendants moved before the Fifth Circuit for leave to appeal the District Court's ruling that the water damage exclusions were ambiguous, and Plaintiffs sought leave to appeal the ruling granting State Farm's motion to dismiss on the basis of the lead-in language. The Fifth Circuit granted both the other insurers' and Plaintiffs' petitions for leave to appeal. On February 1, 2007, Plaintiffs moved the Fifth Circuit to certify certain questions regarding the correct interpretation of the insurance policies to the Louisiana Supreme Court.

In an opinion dated August 2, 2007, the Fifth Circuit reversed the District Court's holding that the term flood was ambiguous and should be construed to mean only "naturally-occurring flood." The Fifth Circuit did so after conducting a thorough review of Louisiana law on contract interpretation, numerous dictionary and treatise definitions of the word "flood," and a substantial body of jurisprudence from Louisiana and across the country interpreting water damage exclusions. *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 209-21 (5th Cir. 2007) (App. 36-66). The Fifth Circuit concluded that

> the flood exclusions in the plaintiffs' policies are unambiguous in the context of the facts of this case. . . . This event was a "flood" within that term's generally prevailing meaning as used in common parlance, and our interpretation of the exclusions ends there. The flood is unambiguously excluded from coverage under the plaintiffs' all-risk policies, and the district court's conclusion to the contrary was erroneous.

Id. at 221 (App. 66).

Accordingly, the Fifth Circuit vacated the denial of the other insurers' motions to dismiss and affirmed the dismissal of Plaintiffs' claims against State Farm, without reaching the issue of the lead-in language relied on by the District Court. In its opinion, the Fifth Circuit also denied Plaintiffs' motion to certify questions to the Louisiana Supreme Court. The Fifth Circuit declined to certify questions "[b]ecause the rules of contract interpretation set forth in the Louisiana Civil Code provide us with an adequate basis to decide this appeal . . . ." *Id.* at 208 n.11 (App. 35-36 n.11). The Fifth Circuit denied Plaintiffs' motion for rehearing *en banc* and motion for a stay of mandate in orders dated August 27, 2007. (App. 200).

On November 19, 2007, the Louisiana Fourth Circuit Court of Appeal issued an opinion addressing, *inter alia*, the interpretation of a water damage exclusion in the context of flood damage resulting from levee breaches. *See Sher v. Lafayette Ins. Co.*, No. 2007-CA-0757, 2007 WL 4247708 (La. Ct. App. Nov. 19, 2007) (App. 202). A two-judge plurality of the Court of Appeal found that the term "flood" was ambiguous as used in the water damage exclusion in the plaintiff's policy and that the policy should be construed in the insured's favor to cover his flood damage. *See id.* at *3-5 (plurality opinion) (Love, J., joined by McKay, J.) (App. 210-14). The two-judge plurality opinion did not discuss or even mention the Fifth Circuit's comprehensive opinion in the present

case addressing precisely the same issue. *See id.* The other three judges on the appellate panel in *Sher* declined to join the plurality opinion's finding that the term "flood" in the water damage exclusion was ambiguous: one judge concurred only in the result,[1] and two judges filed separate opinions specifically disagreeing with the finding of ambiguity and the reasoning behind it.[2]

Plaintiffs now urge this Court to grant certiorari, vacate the Fifth Circuit's affirmance of the grant of State Farm's motion to dismiss and reversal of the District Court's ruling on the other defendant insurers' motions to dismiss, and remand with instructions to certify certain questions to the Louisiana Supreme Court or, alternatively, with instructions to stay its mandate until such time as the *Sher* decision may be addressed by the Louisiana Supreme Court.

REASONS FOR DENYING THE WRIT

This case meets none of this Court's criteria for granting certiorari. There is no conflict as to any question of federal law between the Circuit Courts, between the Fifth Circuit and a state high court, or between the Fifth Circuit and any decision of this Court. Nor has the Fifth Circuit departed from

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[1] Judge Murray concurred only in the result and declined to join in the plurality opinion's finding of ambiguity as to the term "flood." *Sher*, 2007 WL 4247708 at *20 (Murray, J.) (App. 251).

[2] Judge Tobias concurred in the result, but specifically disagreed with the plurality's finding of ambiguity, stating that "it is clear that the word 'flood' applied to any and all floods." *Sher*, 2007 WL 4247708 at *20 (Tobias, J., concurring in result) (App. 252). Judge Cannizzaro dissented in part from the plurality opinion, finding "no merit in the majority's [sic] conclusion that the term 'flood' as utilized in the policy at hand is susceptible to different meanings thereby rendering the water damage exclusion inapplicable. . . . Based upon my review, the term 'flood', as well as the entirety of the exclusion, is clear and unambiguous." *Id.* at *23 (Cannizzaro, J., dissenting in part) (App. 261-62).

the usual practice and course of proceedings so as to justify the exercise of this Court's supervisory power.

To the contrary, the Fifth Circuit acted well within the bounds of its discretion in declining to certify to the Louisiana Supreme Court the issue of contract interpretation raised by Plaintiffs' claim that the water damage exclusions in their insurance policies are ambiguous with respect to flood damage resulting from levee breaches. In examining and deciding the merits of that claim, the Fifth Circuit was guided by Louisiana principles of contract interpretation with which it is familiar, having had ample experience applying those principles in a variety of contexts.

In addition, this case does not present the federalism and other concerns that, under this Court's jurisprudence, counsel the federal courts to defer to the state court on an issue of state law. The Fifth Circuit has not invalidated a state law on federal constitutional grounds, or construed a state statute at all, and has not ventured into legal territory where it is an "outsider." Furthermore, the Fifth Circuit acted in accordance with its established standards for certification and with its prior decisions. The Fifth Circuit's decision not to certify is also amply supported by the established precedents of this Court. Requiring the United States Courts of Appeal to certify questions in cases such as this, as Plaintiffs propose, will only result in delay and obstruction in the functioning of the federal courts in diversity cases.

While this Court does not sit to review the federal court interpretation of state contract law, the manifest correctness of the Fifth Circuit's decision also establishes that no grant of certiorari is warranted in this case. Accordingly, for these reasons and those set forth below, Plaintiffs' Petition should be denied.

I. THE FIFTH CIRCUIT PERMISSIBLY EXERCISED ITS DISCRETION IN DECLINING TO CERTIFY THE QUESTION OF THE INTERPRETATION OF THE WATER DAMAGE EXCLUSIONS TO THE LOUISIANA SUPREME COURT

The United States Circuit Courts of Appeal have broad discretion in determining whether to certify a question of state law to a state supreme court. Indeed, as the Fifth Circuit has stated, the Circuit Courts have a duty to explicate and decide issues of state law in diversity cases. *See Branch-Hines v. Hebert*, 939 F.2d 1311, 1320 (5th Cir. 1991) ("Under the *Erie* doctrine, . . . where the state courts have not yet decided a particular question, it is the duty of the federal court to decide what the state court would hold if faced with it.").

Plaintiffs' Petition raises no novel or unsettled issue as to the scope of a Circuit Court's discretion to certify or decline to certify an issue of state law. Plaintiffs do not ask this Court to resolve any conflict among the Circuits or any conflict with any decision of this Court as to the standards and principles governing the exercise of that discretion. Moreover, the Fifth Circuit's decision not to certify issues to the Louisiana Supreme Court does not depart from the accepted and usual course of judicial proceeding so as to call for an exercise of this Court's supervisory power. Indeed, as shown below, the Fifth Circuit's decision not to certify was well within the bounds of its discretion. Accordingly, the Fifth Circuit's denial of Plaintiffs' motion for certification presents no issue of federal law requiring resolution by this Court and satisfies none of this Court's criteria for granting certiorari. *See* Sup. Ct. R. 10.

In this case, the Fifth Circuit properly undertook to apply settled Louisiana principles of contract interpretation set forth in the relevant Louisiana statutes and case law to the straightforward issues of contract interpretation presented by Plaintiffs' claims. Moreover, although the Louisiana Su-

preme Court has not issued a definitive interpretation of the relevant policy language, courts nationwide have uniformly interpreted similar insurance policy exclusions in the same manner as the Fifth Circuit did in the present case, and the Fifth Circuit's decision is squarely supported by that overwhelming precedent. *See In re Katrina*, 495 F.3d at 212-14 (citing cases finding "flood" includes inundation from a burst levee, dam or dike) (App. 43-49). In short, the Fifth Circuit was not entering uncharted territory or basing its decision upon unsupported conjecture. Rather, it reached the right result based upon the more than sufficient guidance provided by established principles of Louisiana law and a uniform nationwide body of persuasive authority. *See infra* at Point III.

Nor are other concerns present that have led this Court in the past to review a Circuit Court's decision not to certify a question to a state high court or otherwise defer a decision as to a state law issue. This case does not present the strong federalism concerns that exist where certification could avoid an unnecessary federal determination of the constitutionality of a state statute. For example, in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), cited by Plaintiffs, this Court vacated an en banc decision by the Ninth Circuit construing an amendment to the Arizona constitution and holding that the amendment, as construed, was overbroad and unconstitutional. In the course of holding that the case was moot given that the plaintiff, who had sued as a public employee of the state of Arizona, had left her job, this Court emphasized the special federalism concerns that arise where "a federal court is asked to *invalidate* a State's law." *Id.* at 79 (emphasis added) (citing *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 573-74 (1947)).[3] *See also Bel-*

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[3] Plaintiffs also cite Justice Stevens' dissent in *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 777 (2005), but neglect to mention that that case likewise involved a situation where a decision by a state supreme court on state law issues could have rendered it unnecessary to address the constitutional question.

lotti v. Baird, 428 U.S. 132, 147 (1976) (court should have abstained and certified question "where an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication'") (quoting *Harrison v. NAACP*, 360 U.S. 167, 177 (1959)).

Likewise, this Court has favored certification when (unlike here) the federal court is applying the unfamiliar law of a distant state. Thus, in *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), this Court remanded a case to the Second Circuit for further consideration of whether that court should certify a question of Florida law to the Florida Supreme Court. *See id.* at 391-92. The Court explained that

> resort to [certification] would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant State. When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as "outsiders" lacking the common exposure to local law which comes from sitting in the jurisdiction.

Id. at 391.

Here, in contrast, the Fifth Circuit was called upon to interpret an insurance policy by applying rules of contract interpretation that it is accustomed to apply.[4] As this Court

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[4] There are myriad examples of the Fifth Circuit applying Louisiana rules of insurance contract interpretation. *See, e.g.*, *Arias-Benn v. State Farm Fire & Cas. Ins. Co.*, 495 F.3d 228, 230 (5th Cir. 2007) (in Hurricane Katrina case, interpreting insurance policy under Louisiana law); *Times-Picayune Publ'g Corp. v. Zurich Am. Ins. Co.*, 421 F.3d 328 (5th Cir. 2005) (interpreting excess employee dishonesty policy in diversity action); *Boston Old Colony Ins. Co. v. Tiner Assocs. Inc.*, 288 F.3d 222 (5th Cir. 2002) (interpreting care, custody, or control exclusion to excess insurance policy); *Thermo Terratech v. GDC Enviro-Solutions, Inc.*, 265 F.3d 329 (5th Cir. 2001) (interpreting coverage exclusions in CGL policy); *Pryta-*

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stated in *Lehman Brothers*, in such circumstances, federal judges have "the common exposure to local law which comes from sitting in the jurisdiction." *Lehman Bros.*, 416 U.S. at 391.[5] *Cf. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985) ("Normally . . . we defer to the construction of a state statute given it by the lower federal courts. We do so not only to 'render unnecessary review of their decisions in this respect,' but also to reflect our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States.") (citations omitted).

Plaintiffs also wrongly contend that the Fifth Circuit in this case did not follow its own standards regarding certification. (Pet. at 10). The Fifth Circuit has held that "[t]he most important [factors with respect to certification] are the closeness of the question and the existence of sufficient sources of state law . . . to allow a principled rather than conjectural conclusion." *Williamson v. Elf Aquitaine, Inc.*, 138 F.3d 546, 549 (5th Cir. 1998) (denying motion for certification where "Mississippi case law . . . is sufficiently clear to allow this

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nia Park Hotel Ltd. v. Gen. Star Indem. Co., 179 F.3d 169 (5th Cir. 1999) (interpreting coverage provision of hotel insurance policy).

[5] Plaintiffs erroneously suggest that certification here was warranted because "[h]istorically, insurance has been an area over which 'the States [have] enjoyed a virtually exclusive domain.'" (Pet. at 8-9) (citing *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978); 15 U.S.C. § 1011.) Plaintiffs' cited authorities support only the proposition that a state possesses broad authority in *regulating* insurance. *See Barry*, 438 U.S. at 539; 15 U.S.C. § 1011. Those authorities in no way support the suggestion that federal courts may not properly decide a straightforward issue of insurance interpretation such as that presented by this case, even if the specific issue has not been decided by the highest state court. *Cf. Transcon. Gas Pipeline Corp. v. Transp. Ins. Co.*, 958 F.2d 622, 623 (5th Cir. 1992) (per curiam) ("[c]ertification is not a panacea for resolution of those complex or difficult state law questions which have not been answered by the highest court of the state. Neither is it to be used as a convenient way to duck our responsibility in . . . diversity jurisdiction").

court to decide the issue presented") (quoting *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274-75 (5th Cir. 1976) (declining to certify question regarding powers of Florida Attorney General to Florida Supreme Court and observing that in a case which "concerns 'the fundamental political structure of the State of Florida' . . . "[c]omity considerations are more applicable . . . than in [a case] involving, for example, the interpretation of a clause in an insurance contract")). Here, the Fifth Circuit, consistent with these factors, properly declined to certify questions "[b]ecause the rules of contract interpretation set forth in the Louisiana Civil Code provide us with an adequate basis to decide this appeal." *In re Katrina*, 495 F.3d at 208 n.11 (App. 35-36 n.11) (citing *Swearingen v. Owens-Corning Fiberglass Corp.*, 968 F.2d 559, 564 (5th Cir. 1992) (denying certification where "our decisional analysis is relatively straightforward.")).

Plaintiffs further assert that the Fifth Circuit's decision not to order certification in this case is inconsistent with its decisions to certify insurance questions in other cases. (Pet. at 13-15; *see also id.* at 10). Plaintiffs cite to cases in which certification was ordered where there was a clear split of authority among the state intermediate appellate courts on the questions at issue. *See OneBeacon Ins. Co. v. Don's Building Supply, Inc.*, 496 F.3d 361, 366 (5th Cir. 2007) (certifying question to Texas Supreme Court where "the Texas appellate courts are split on the appropriate rule"); *Fiess v. State Farm Lloyds*, 392 F.3d 802, 809-11 (5th Cir. 2004) (certifying questions to the Texas Supreme Court where conflicting intermediate appellate court decisions were "irreconcilable"); *Jesco Constr. Corp. v. Nationsbank Corp.*, 278 F.3d 444, 447 (5th Cir. 2001) (certifying questions to Louisiana Supreme Court where "[t]he Louisiana courts of appeals have twice since revisited this issue, reaching opposite results"). No such direct conflict among the state intermediate appellate courts exists in this case, and the Fifth Circuit acted well

within its discretion in declining to certify the straightforward questions of contract interpretation. [6]

Even if the two-judge plurality opinion in *Sher* had been issued before the Fifth Circuit's opinion in this case, the Fifth Circuit would have been under no obligation to follow it or order certification because of it. *See Citizen Comm. for Better Law Enforcement v. Lafayette*, 685 So. 2d 289, 293 (La. Ct. App. 1996) (a plurality opinion "is of little value as precedent and should properly be limited to the facts of that case only"); *see also FDIC v. Abraham*, 137 F.3d 264, 268 (5th Cir. 1998) (given that "we are chary to rely on–much less be bound by–the holding of one intermediate state appellate court as the harbinger of such a future ruling by the state's highest court, we are doubly so when, as now, the state in question is Louisiana, where the primary sources of law are its constitution, codes, and statutes and the decisions of its courts are secondary sources of law until and unless the number and unanimity of such decisions achieve the force of law through the Civil Law doctrine of *jurisprudence constante*"); *Chevron USA, Inc. v. Vermilion Parish Sch. Bd.*, 377 F.3d 459, 462 (5th Cir. 2004) (similar). Moreover, there is no reason to believe that the Fifth Circuit would have followed, or been in any way influenced by, the two-judge plurality opinion in *Sher*. Unlike the Fifth Circuit's carefully reasoned and well supported opinion in this case, the plurality opinion in *Sher* had little analysis, cited no cases to support its ruling, and did not address the overwhelming authority against the result it reaches. *See infra* at Point III.

In sum, the Fifth Circuit in this case clearly "believe[d] that it c[ould] resolve an issue of state law with available research materials already at hand, and ma[d]e the effort to do so," such that "its determination should not be disturbed sim-

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[6] Plaintiffs erroneously rely upon the District Court's statement that it would have certified questions to the Louisiana Supreme Court if the pertinent rule permitted. (Pet. at 9-10). Obviously, this statement by the District Court was not in any way binding on the Fifth Circuit.

ply because the certification procedure existed but was not used." *Lehman Bros.*, 416 U.S. at 395 (Rehnquist, J., concurring). Plaintiffs' Petition to have this Court grant certiorari, vacate the judgment below and remand this case with direction to the Fifth Circuit to certify to the Louisiana Supreme Court the issue of construing the water damage policy exclusion is without merit and should be denied.

II. A GRANT-VACATE-REMAND ORDER IS INAPPROPRIATE IN THIS CASE

Plaintiffs ask this Court for the alternative relief of instructing the Fifth Circuit to recall and then stay its mandate pending possible review of the *Sher* decision by the Louisiana Supreme Court. (Pet. at 21). Plaintiffs raise this request only in the Conclusion of their Petition. (*See id.*) Plaintiffs fail to cite any authority that would support such relief. Plaintiffs appear to be asking for a Grant-Vacate-Remand ("GVR") order compelling the Fifth Circuit to recall and stay its mandate and await a possible appellate disposition of *Sher*. However, there is no support in this Court's GVR jurisprudence for the issuance of a GVR order in this case.

This case does not fit "within the category of cases in which [this Court has] held it is proper to issue a GVR order." *Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 896 (1997) (per curiam). The category of cases where "'a GVR order is . . . potentially appropriate'" consists of cases "'[w]here intervening developments, or recent developments that [this Court] ha[s] reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.'" *Id.* (ellipsis in original) (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam)).

Thus, a prerequisite to a GVR order as sought by Plaintiffs is that "the federal-court decision on state law appears to contradict a *subsequent* decision of the state supreme court." *Thomas v. Am. Home Prods., Inc.*, 519 U.S. 913, 915 (1996) (Scalia, J., concurring). Here, there has been no such recent or intervening development in Louisiana law. There is no decision of the Louisiana Supreme Court that the Fifth Circuit's decision appears to contradict. Plaintiffs merely claim that such a development *may* occur in *Sher*, a case in which the Louisiana Supreme Court has not yet even granted review. State Farm is not aware of any precedent for this Court's issuing a GVR order in circumstances such as those present here, simply on the supposition that a state supreme court might in the future issue a decision contrary to the earlier conclusion of a circuit court in a case. Nor has this Court issued a GVR order directing a circuit court to stay its judgment pending the outcome of an appeal in a state high court where review has been granted.

In *Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944), this Court noted the general rule that *while a federal case remains sub judice*, a judgment of the federal court on issues of state law must be reversed on appellate review if in the meantime the state courts have adopted a different rule of law. However, there is no rule that the time during which a case remains sub judice should be extended in anticipation of the possibility of the state court's adopting a different rule of law, which is what Plaintiffs propose here. *Cf. Lawrence v. Chater*, 516 U.S. 163, 173 (1996) (per curiam) ("This Court should not just GVR a case . . . 'because it observes that there has been a postjudgment change in the personnel of the state supreme court, and wishes to give the new state justices a shot at the case.'") (quoting *Lawrence*, 516 U.S. at 189 (Scalia, J., dissenting)).

Further, the balance of the equities does not weigh in favor of the proceeding proposed by Plaintiffs and the delay that such a rule, if adopted, would cause in the issuance of final judgments in diversity cases. Considerations of

"[r]espect for lower courts, the public interest in finality of judgments, and concern about [this Court's] own expanding certiorari docket all counsel against undisciplined GVR'ing." *Lawrence*, 516 U.S. at 174. In addition, "if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." *Id.* at 168.

The GVR order (apparently) sought by Plaintiffs would postpone the resolution of this case for the indefinite future, pending a decision from the Louisiana Supreme Court which may never eventuate and which, if it does issue, would most likely accord with the well-reasoned opinion of the Fifth Circuit. Such delay in the case is unwarranted, and Plaintiffs' request that this Court vacate the judgment below and direct the Fifth Circuit to stay its judgment should be denied.

III. THE FIFTH CIRCUIT CORRECTLY HELD THAT THE WATER DAMAGE EXCLUSIONS IN THE POLICIES AT ISSUE UNAMBIGUOUSLY EXCLUDE ALL FLOOD DAMAGE

The manifest correctness of the Fifth Circuit's construction of the policy term "flood" in the defendant insurers' water damage exclusions underscores the inappropriateness of the relief requested by Plaintiffs in their Petition to this Court. Plaintiffs assert that the Fifth Circuit was wrong on the merits but offer no substantive criticism of the Fifth Circuit's reasoning. Instead, Plaintiffs simply rely upon the fact that the two-judge plurality opinion in *Sher* reached the opposite conclusion.

The Fifth Circuit's comprehensive analysis of the relevant issues speaks for itself and need not be reiterated at length here. It is worth noting, however, that the Fifth Circuit considered and rejected the arguments apparently relied upon by the plurality opinion in *Sher*. In doing so, the Fifth Circuit looked to and analyzed numerous principles of Louisiana contract law, Louisiana judicial decisions on insurance

contract law, and decisions from other jurisdictions addressing the precise issue presented by Plaintiffs' claims as to the definition of flood. The *Sher* plurality opinion, in contrast, cited no cases from Louisiana or any other state regarding this issue and provided remarkably little analysis.

The Fifth Circuit and the *Sher* plurality both recognized that because "flood" was left undefined in the policies, that term must be given its generally prevailing meaning. *In re Katrina*, 495 F.3d at 209 (App. 40); *Sher*, 2007 WL 4247708, at *4 (App. 212). However, their respective analyses diverge from there, both in the depth of the consideration given to the question and the conclusion reached. The Fifth Circuit made a thorough review of a broad range of authorities, including a variety of dictionaries and encyclopedias, insurance treatises, Louisiana cases, and a substantial body of jurisprudence from around the country. *See In re Katrina*, 495 F.3d at 210-14 (App. 41-49). The Fifth Circuit found agreement among those sources that the generally prevailing meaning of "flood" includes all flooding, whether natural or non-natural. *See id.* The *Sher* plurality opinion, on the other hand, simply made the bald assertion that "'flood' is susceptible to different meanings due to varying causes of floods," with no reference to any sources that would support the claimed ambiguity and without addressing or discussing the Fifth Circuit's opinion in this case. *See Sher*, 2007 WL 4247708, at *4 (App. 212).

The *Sher* plurality opinion also erred in its analysis of the water damage exclusion as a whole, incorrectly reasoning that the word "flood" was followed by a list of other purportedly "natural" perils (such as surface water, waves, and overflow of a body of water) and must therefore also be taken to refer to natural floods. *Id.* (App. 213). The Fifth Circuit convincingly rejected this reasoning, citing numerous cases holding that other named events in the water damage exclusion can be both natural or non-natural and that no inference of a limitation of the meaning of "flood" to natural floods could be drawn from the wording of the water damage exclusion. *See In re Katrina*, 495 F.3d at 218-19 (App. 59-60).

Furthermore, the Fifth Circuit properly recognized that the Louisiana Supreme Court has held that, even if "'a word has two meanings, one broad and one more restrictive included within the broader meaning, it does not follow that the narrower meaning was intended.'" *In re Katrina*, 495 F.3d at 211 (App. 41) (quoting *Commercial Union Ins. Co. v. Advance Coating Co.*, 351 So. 2d 1183, 1186 (La. 1977)). The *Sher* plurality opinion ignored that guidance from the Louisiana Supreme Court and concluded without comment that the narrower definition applied. *Sher*, 2007 WL 4247708, at *4 (App. 213).

In sum, the Fifth Circuit conducted a thorough and faithful analysis, as required under *Erie*, to determine what result the Louisiana Supreme Court would reach on the issues of insurance contract interpretation presented by this case. Plaintiffs cite the *Sher* plurality opinion as per se evidence that the Fifth Circuit erred, but that opinion offers no genuine basis to doubt the correctness of the Fifth Circuit's conclusions. Plaintiffs' request to this Court to vacate the judgment of the Fifth Circuit and require that court either to certify the issue to the Louisiana Supreme Court or to stay its mandate for an indefinite period pending a possible decision on the issue from the Louisiana Supreme Court should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

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In The

Supreme Court of the United States

GLADYS CHEHARDY, *et al.*,

Petitioners,

v.

ALLSTATE INDEMNITY CO., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

1. Should this Court review whether the Fifth Circuit erred, as a matter of Louisiana insurance law, in concluding that the inundation of New Orleans following Hurricane Katrina was a "flood" excluded from coverage by Petitioners' insurance policies?

2. Did the Fifth Circuit abuse its discretion in concluding that "the rules of contract interpretation set forth in the Louisiana Civilcy Code provide us with an adequate basis to decide this appeal," and therefore denying Petitioners' motion to certify the question presented to the Louisiana Supreme Court?

CORPORATE DISCLOSURE STATEMENT

Respondent Allstate Insurance Company is a wholly-owned subsidiary of The Allstate Corporation, which is a Delaware corporation. The stock of The Allstate Corporation is publicly-traded. No publicly-held entity owns 10% or more of the stock of The Allstate Corporation.

Respondent Allstate Indemnity Company is a wholly-owned subsidiary of Allstate Insurance Company, which is an Illinois insurance company. Allstate Insurance Company is a wholly-owned subsidiary of The Allstate Corporation, a Delaware corporation. The stock of The Allstate Corporation is publicly-traded. No publicly-held entity owns 10% or more of the stock of The Allstate Corporation.

Respondent Encompass Indemnity Company is a wholly-owned subsidiary of Allstate Insurance Company, an Illinois insurance company. Allstate Insurance Company is a wholly-owned subsidiary of The Allstate Corporation, a Delaware corporation. The stock of The Allstate Corporation is publicly-traded. No publicly-held entity owns 10% or more of the stock of The Allstate Corporation.

Respondent The American Insurance Company is a wholly-owned subsidiary of Fireman's Fund Insurance Company. Fireman's Fund Insurance Company, a California corporation, is a wholly-owned subsidiary of Allianz Global Risks US Insurance Company.

CORPORATE DISCLOSURE STATEMENT – Continued

Allianz Global Risks US Insurance Company is a wholly-owned subsidiary of Allianz of America, Inc., which is a wholly-owned subsidiary of Allianz Aktiengesellschaft (Allianz AG). Allianz AG is a publicly-held company that indirectly holds 10% or more of Fireman's Fund Insurance Company and its subsidiaries.

Respondent Great Northern Insurance Company is a wholly-owned subsidiary of Federal Insurance Company, which, in turn, is a wholly-owned subsidiary of The Chubb Corporation, a publicly-traded company on the New York Stock Exchange.

Respondent The Hanover Insurance Company is a wholly-owned subsidiary of Opus Investment Management, Inc., a wholly-owned subsidiary of The Hanover Insurance Group, Inc., a publicly-traded company of which Hotchkiss & Wiley owns more than 10% of the stock.

Respondent Lafayette Insurance Company is a subsidiary of the United Fire & Casualty Company, a foreign insurer domiciled in Iowa, which is publicly-traded on NASDAQ.

Respondent Lexington Insurance Company is 70% owned by National Union Fire Insurance Company of Pittsburgh, PA, 20% owned by The Insurance Company of the State of Pennsylvania, and 10% owned by AIG Casualty Company – formerly known

CORPORATE DISCLOSURE STATEMENT – Continued

as Birmingham Fire Insurance Company of Pennsylvania. National Union Fire Insurance Company of Pittsburgh, PA, The Insurance Company of the State of Pennsylvania, and AIG Casualty Company are each 100% owned by AIG Commercial Insurance Group, Inc. AIG Commercial Insurance Group, Inc. is 100% owned by AIG Property Casualty Group, Inc. AIG Property Casualty Group, Inc. is 100% owned by American International Group, Inc.; a publicly-traded corporation. No parent corporation or publicly-held corporation owns 10% or more of American International Group, Inc. stock.

Respondent Liberty Mutual Fire Insurance Company discloses as follows: Liberty Mutual Group owns 100% of the stock of Liberty Mutual Fire Insurance Company. LMHC Massachusetts Holdings Inc. owns 100% of the stock of Liberty Mutual Group Inc. Liberty Mutual Holding Company Inc. owns 100% of the stock of LMHC Massachusetts Holdings Inc. No publicly-traded entity owns any stock of any of the above-named entities.

Respondent Louisiana Citizens Property Insurance Corporation is the statutorily created entity charged with operating the residual property insurance plan for the State of Louisiana pursuant to La. Rev. Stat. § 22:1430 *et seq*.

CORPORATE DISCLOSURE STATEMENT – Continued

Respondent The Standard Fire Insurance Company is a wholly-owned subsidiary of Travelers Insurance Group Holdings Inc., which is a wholly-owned subsidiary of Travelers Property Casualty Corp., which is a wholly-owned subsidiary of The Travelers Companies, Inc., a publicl -traded company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	vii
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	7
REASONS FOR DENYING THE WRIT	9
I. THE ONLY SUBSTANTIVE ISSUE IN THIS CASE IS A QUESTION OF LOUISIANA INSURANCE LAW	9
II. THE FIFTH CIRCUIT DID NOT ABUSE ITS DISCRETION IN DECLINING TO CERTIFY THE QUESTION PRESENTED TO THE LOUISIANA SUPREME COURT	10
III. THE DECISION OF THE LOUISIANA COURT OF APPEAL IN *SHER V. LAFAYETTE INSURANCE CO.* DOES NOT WARRANT A GVR ORDER	15
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES

American Int'l Specialty Lines Ins. Co. v. Canal Indem. Co., 352 F.3d 254 (5th Cir. 2003).....4

Arias-Benn v. State Farm Fire & Cas. Ins. Co., 495 F.3d 228 (5th Cir. 2007) 12

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997).....13, 14

Butner v. United States, 440 U.S. 48 (1979).....9, 10

Chaney v. Travelers Ins. Co., 249 So. 2d 181 (La. 1971).....16

Chevron USA, Inc. v. Vermillion Parish Sch. Bd., 377 F.3d 459 (5th Cir. 2004).....17

Citizens Comm. For Better Law Enforcement v. City of Lafayette, 685 So. 2d 289 (La. App. Ct. 1996) 17

Cochran v. B.J. Services Co. USA, 302 F.3d 399 (5th Cir. 2002) 12

Commissioner v. Estate of Bosch, 387 U.S. 456 (1967).....17

Elk Grove v. Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).....9

Fiess v. State Farm Lloyds, 392 F.3d 802 (5th Cir. 2004) 14

Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976) 12

Frey v. Amoco Prod. Co., 951 F.2d 67 (5th Cir. 1992) 14

TABLE OF AUTHORITIES – Continued

Page

In Re: Katrina Canal Breaches Consolidated Litig., 495 F.3d 191 (5th Cir. 2007).....*passim*

In Re: Whitaker Constr. Co., 439 F.3d 212 (5th Cir. 2006).....4

Jesco Constr. Corp. v. Nationsbank Corp., 278 F.3d 444 (5th Cir. 2001).....14

Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989).....9

Lake Charles Diesel, Inc. v. GMC, 328 F.3d 192 (5th Cir. 2003).....17

Lawrence v. Charter, 516 U.S. 163 (1996).....19

Lehman Bros. v. Schein, 416 U.S. 386 (1974).....11, 13

McMillan v. Monroe County, 520 U.S. 781 (1997).....9

Meredith v. City of Winter Haven, 320 U.S. 228 (1943).....11

One Beacon Ins. Co. v. Don's Bldg. Supply, Inc., 496 F.3d 361 (5th Cir. 2007).....14

Patterson v. Mobil Oil Corp., 335 F.3d 476 (5th Cir. 2003).....12

Riverwood Intern. Corp. v. Employers Ins. of Wasau, 420 F.3d 378 (5th Cir. 2005).....12

Seafirst Commercial Corp. v. U.S. Fid. & Gaur. Co., 780 F.2d 1290 (5th Cir. 1986).....13

Sher v. Lafayette Ins. Co., No. 2007-CA-0757, 2007 WL 4247708 (La. Ct. App. Nov. 19, 2007).....*passim*

TABLE OF AUTHORITIES – Continued

Page

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 2

Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) 14

Transamerica Ins. Co. v. Duro Bag Mfg. Co., 50 F.3d 370 (6th Cir. 1995) 13

United Fire & Cas. Co. v. Hixson Bros., Inc., 453 F.3d 283 (2006) 12

West American Ins. Co. v. Bank of Isle of Wight, 673 F. Supp. 760 (E.D. Va. 1987) 13

Wharf (Holdings), Ltd. v. United Int'l Holdings, Inc., 532 U.S. 588 (2001) 10

Woodbridge Place Apartments v. Wash Square Capital, Inc., 965 F.2d 1429 (7th Cir. 1992) 13

STATUTES

28 U.S.C. § 1292(b) (2006) 4

LA. CIV. CODE ANN., art. 2047 (2007) 4

BRIEF FOR RESPONDENTS IN OPPOSITION

The sole issue decided by the Fifth Circuit was the proper construction of an insurance policy provision under state insurance law. In reviewing the trial court's ruling on Rule 12 motions, the Fifth Circuit concluded unanimously that the massive inundation of New Orleans at the time of Hurricane Katrina was clearly a "flood" as that term is used in water damage exclusions in homeowners policies. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 195-97, 206-21 (5th Cir. 2007), Appendix to Petition for Writ of Certiorari ("App.") 4-5, 29-66. The Fifth Circuit also denied Petitioners' request to certify this question to the Louisiana Supreme Court because there was adequate guidance in the principles of contract construction mandated by the Louisiana Civil Code, although there was no Louisiana precedent directly on point. The Fifth Circuit remanded to the district court for further proceedings because the district court had only ruled on the applicability of the "flood" exclusions and had not ruled on the remaining counts in the complaints. Following remand, the district court has stayed this case pending action by the Louisiana Supreme Court on writ applications in *Sher v. Lafayette Insurance Co.*, which involves, among other things, application of a local insurance carrier's flood exclusion that is similar to some of the Respondents' various flood exclusions here.

None of this Court's considerations for granting certiorari are present in this case. There is no circuit split or important federal question involved. And the

lower courts did not depart from the usual course of judicial proceedings in deciding this case. Petitioners do not even argue that this case involves any question of *national* importance, but contend only that the state law issue is of great *local* importance. Petition for Writ of Certiorari ("Pet.") at 11-12, 15. There is no issue warranting this Court's review.

STATEMENT OF THE CASE[1]

On August 29, 2005, Hurricane Katrina struck the City of New Orleans. After the storm passed through New Orleans, water began to inundate the City. New Orleans officials determined that breaches in levee walls caused water to accumulate in various areas of the City and adjoining parishes. In the aftermath of the storm, some 80% of Orleans Parish was "under water."

Petitioners are homeowners (and in one instance, a commercial property owner) who sustained water damage to their properties as a result of the flooding. Damage caused by "flood" is generally covered by flood insurance policies issued under the federally-subsidized National Flood Insurance Program, but is generally excluded by homeowners policies and many

[1] On this appeal from a ruling on Fed. R. Civ. P. 12 motions, the material factual allegations of Petitioners' complaint are taken as true. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998).

commercial policies. Petitioners contend, however, that what occurred in New Orleans was not a "flood" because the term "flood" should be restricted to "natural" events. They allege that the inundation of New Orleans was caused by human acts or omissions in the design, construction and maintenance of the levees.

Petitioners filed this putative class action against several insurance companies, which was heard together with several parallel class and individual actions. All plaintiffs sought a declaration that their respective homeowners and commercial insurance policies cover water damage to their properties resulting from levee failures during Hurricane Katrina.

The insurers moved to dismiss, contending that the flood or water damage exclusions in the various insurance policies at issue bar coverage. Although the insurance policies at issue are not identical, all of the policies contain provisions excluding loss caused directly or indirectly by water or water damage, which is defined to include "flood."[2]

The district court ruled that the water damage exclusions in all of the insurance policies at issue in this case, except those issued by State Farm Fire & Casualty Company ("State Farm"), were ambiguous and therefore had to be construed against the

---

[2] Some of the precise language of the respective insurance policies at issue is set forth in the Fifth Circuit's opinion. *Katrina Canal Breaches*, 495 F.3d at 197-203, App. 8-24.

insurers. It dismissed the claims against State Farm and denied motions to dismiss by the other insurers, certifying that issue for appeal pursuant to 28 U.S.C. § 1292(b) (2006).

The Fifth Circuit concluded that "even if the plaintiffs can prove that the levees were negligently designed, constructed, or maintained and that the breaches were due to this negligence, the flood exclusions in the plaintiffs' policies unambiguously preclude their recovery." *Katrina Canal Breaches,* 495 F.3d at 196, App. 5. It rejected Petitioners' argument that the lack of a definition of "flood" rendered the term ambiguous. Absent a definition, a court must, under the Louisiana Civil Code, give the term "'its generally prevailing meaning.'"[3] *Id.* at 209-10, App. 36, 40 (citing and quoting LA. CIV. CODE ANN. art. 2047). The Fifth Circuit extensively examined how "flood" has been defined in dictionaries, treatises, and cases from both Louisiana and elsewhere. *Id.* at

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[3] Louisiana is a unique civil law jurisdiction in which "the only authoritative 'sources of law are legislation and custom,'" and "courts must look first and foremost to the state's 'primary sources of law: the State's Constitution, codes, and statutes.'" *American Int'l Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 260 (5th Cir. 2003) (internal citations omitted). *See also In re Whitaker Constr. Co.*, 439 F.3d 212, 222 (5th Cir. 2006) ("In the civil law tradition, the Civil Code is the 'solemn expression of legislative will' to which our *Erie* obligation applies.") (internal citations omitted). The Fifth Circuit analyzed and applied the applicable provisions of the Louisiana Civil Code. *Katrina Canal Breaches*, 495 F.3d at 206-21, App. 29-66.

210-15, App. 41-49. In light of all of these definitions, it concluded that:

> the flood exclusions are unambiguous in the context of this case and that what occurred here fits squarely within the generally prevailing meaning of the term "flood." When a body of water overflows its normal boundaries and inundates an area of land that is normally dry, the event is a flood. . . .
>
> Additionally, a levee is a *flood*-control structure; its very purpose is to prevent the floodwaters of a watercourse from overflowing onto certain land areas, i.e., to prevent floods from becoming more widespread. By definition, whenever a levee ruptures and fails to hold back floodwaters, the result is a more widespread flood. That a levee's failure is due to its negligent design, construction, or maintenance does not change the character of the water escaping through the levee's breach; the waters are still floodwaters, and the result is a flood.

Id. at 214, App. 49-50 (emphasis in original, footnote and citations omitted).

The Fifth Circuit disagreed with Petitioners that, in the context here, the term "flood" could reasonably be read as limited to natural events. While Petitioners cited many dictionary definitions, "the dictionaries we have reviewed make no distinction between floods with natural causes and those with non-natural causes," and some specifically say that a flood may result from failure of a dam or levee. *Id.* at 215,

App. 51-52. Cases finding coverage for inundations resulting from burst water mains are distinguishable because the latter do not result from the overflow of a body of water and because the volume of water involved is not comparable to that which inundated New Orleans. *Id.* at 217-19, App. 56-57.

Petitioners argued that the term "flood" was part of a series with other terms: "surface water," "waves," "tidal water," and "overflow of a body of water." *Id.* at 218, App. 59. They contended that all of these terms referred only to events that occur naturally, and that "flood" should be read in light of that limitation. *Id.*, App. 59. The Fifth Circuit disagreed with the premise:

> For example, a "surface water" exclusion has been held to bar coverage where the inadequate design of a drainage system caused water to accumulate rather than drain away, resulting in water damage. And the term "waves" has been held to "encompass[ ] both those waves which are motivated by natural forces and those motivated by artificial forces" such as passing motorboats.

Id. at 218-19, App. 59-60 (internal citations omitted). Because "at least some of the terms immediately surrounding 'flood' in the water-damage exclusions also relate to both natural and non-natural events, the canon of *noscitur a sociis* does not support the plaintiffs' proposed limitation of the term 'flood.'" *Id.* at 219, App. 60. The Fifth Circuit also noted that a canon of construction cannot be used to inject

ambiguity into an otherwise unambiguous contractual provision. *Id.*, App. 60-61.

Accordingly, the Fifth Circuit concluded that the flood exclusions were unambiguous in the factual context here. *Id.*, App. 61. The Fifth Circuit therefore affirmed the dismissal of the complaints against State Farm, vacated the orders as to the other insurers and remanded for further proceedings. *Id.* at 224, App. 72-73. Petitioners moved to stay the mandate, contending that the Fifth Circuit's decision was in conflict with opinions by Louisiana state trial court judges, and noting that the Louisiana Fourth Circuit Court of Appeal was scheduled to hear oral argument in September of 2007 in *Sher v. Lafayette Insurance Co.*, a case involving the applicability of a flood exclusion. Petitioners asked the Fifth Circuit to await decisions by both the Louisiana Fourth Circuit Court of Appeal and Louisiana Supreme Court in *Sher* before issuing its mandate. Petitioners also filed petitions for rehearing en banc, in which they asked the en banc court to certify the question to the Louisiana Supreme Court. The Fifth Circuit denied the motion to stay the mandate and the en banc petition. App. 200-01.

SUMMARY OF ARGUMENT

This case concerns construction of insurance policies under state insurance law, a subject this Court properly leaves to the lower federal courts.

Petitioners make only one argument: that the Fifth Circuit should have certified the question presented to the state supreme court. But this Court has held that the decision whether to certify a question of state law to the appropriate state court rests in the sound discretion of the court asked to certify. There is no challenge to the criteria the Fifth Circuit looks to in making that discretionary decision. The Fifth Circuit acted well within its discretion in concluding that the Louisiana Civil Code and the state supreme court decisions on insurance policy interpretation provided ample basis for it to decide the question presented, but even if it made a mistake, it is not this Court's function to correct individual mistakes, particularly when the issues are ones of state law.

While Petitioners make much of the subsequent state intermediate appellate decision in *Sher*, there was no majority opinion in that case, nor did the plurality opinion favoring Petitioners' arguments offer any persuasive rebuttal to the Fifth Circuit's thorough analysis of the state insurance law issues here. This Court has never issued a GVR order because a state *intermediate* appellate court issued an opinion conflicting with a federal court of appeals decision, or because review was being sought in a state supreme court. There is certainly no reason to do so here based on a non-precedential, evenly-divided and sparsely reasoned opinion of one of Louisiana's five circuit courts of appeal. This is particularly true in a jurisdiction in which legislation is the primary source of law and appellate decisions,

even unanimous ones, are not binding until there is a line of authority strong enough to become *jurisprudence constante*.

REASONS FOR DENYING THE WRIT

I. THE ONLY SUBSTANTIVE ISSUE IN THIS CASE IS A QUESTION OF LOUISIANA INSURANCE LAW.

The fundamental issue presented is whether the Fifth Circuit correctly decided a Louisiana state law question of insurance policy construction. This is not a subject that warrants this Court's review.

This Court has consistently refused to grant certiorari to review a federal appellate court's interpretation of state law. This Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004). This is because "federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than [the Supreme Court] to determine how local courts would dispose of comparable issues." *Butner v. United States*, 440 U.S. 48, 58 (1979). *See also McMillian v. Monroe County*, 520 U.S. 781, 786 (1997) ("Since the jurisdiction of the [Eleventh Circuit] Court of Appeals includes Alabama, we defer considerably to that court's expertise in interpreting Alabama law."); *Jett v. Dallas*

Indep. Sch. Dist., 491 U.S. 701, 738 (1989) ("We think the [Fifth Circuit] Court of Appeals, whose expertise in interpreting Texas law is greater than our own, is in a better position to determine [the state law issues in the case].").

Lower federal judges' familiarity with local law routinely leads this Court to refuse to review a federal court decision when – as here – the issue is an interpretation of state law. *See, e.g., Wharf (Holdings), Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001) ("Though Wharf disputes the correctness of [the Tenth Circuit's interpretation of the Colorado Statute of Frauds], we ordinarily will not consider such a state-law issue, and we decline to do so here."); *Butner*, 440 U.S. at 51 ("We did not grant certiorari to decide whether the Court of Appeals correctly applied North Carolina law.").

This Court should follow that same course here and refuse to review the Fifth Circuit's application of the Louisiana Civil Code to construe Petitioners' insurance policies.

II. THE FIFTH CIRCUIT DID NOT ABUSE ITS DISCRETION IN DECLINING TO CERTIFY THE QUESTION PRESENTED TO THE LOUISIANA SUPREME COURT.

There is no merit to Petitioners' suggestion that the Fifth Circuit abused its discretion in denying Petitioners' motions to certify the questions presented to the Louisiana Supreme Court. More than sixty

years ago, this Court settled the question of whether a federal court must have guidance from state courts when confronted with a question of state law not already precisely decided by the state courts:

> [I]t has from the first been deemed to be the duty of federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. . . . [D]enial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act.

Meredith v. City of Winter Haven, 320 U.S. 228, 234-35 (1943) (internal citations omitted). Certification is not "obligatory" even if "there is doubt as to local law. . . ." *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974). Rather, deciding whether to certify "in a given case rests in the sound discretion of the federal court." *Id.* at 391 (Rehnquist, J., concurring). "If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used[,]" and this Court will leave the question of whether certification is appropriate on the facts of a given case "to the sound judgment of the court making the initial choice." *Id.* at 395.

In accordance with this Court's precedent, the Fifth Circuit holds that the decision whether to certify a question to the state supreme court is discretionary, depending on consideration of many factors. *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 487 (5th Cir. 2003); *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274 (5th Cir. 1976). "The most important are the closeness of the question and the existence of sufficient sources of state law . . . to allow a principled rather than conjectural conclusion." *Id.* at 274-75. But the court also considers the "practical limitations of the certification process; significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court." *Id.* Petitioners have never questioned these standards, either in their Petition or in the Fifth Circuit. They argue only that the Fifth Circuit made a mistake in this case by not certifying to the Louisiana Supreme Court.

The Fifth Circuit acted well within its discretion in denying certification. The Fifth Circuit routinely construes Louisiana insurance policies, without resorting to certification.[4] It did not need to resolve

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[4] *See Arias-Benn v. State Farm Fire & Cas. Ins. Co.*, 495 F.3d 228, 230 (5th Cir. 2007) (interpreting insurance policy under Louisiana law to determine coverage for spoiled refrigerators due to Katrina); *United Fire & Cas. Co. v. Hixson Bros. Inc.*, 453 F.3d 283, 284 (5th Cir. 2006) (interpreting insurance endorsement under Louisiana law); *Riverwood Intern. Corp. v. Employers Ins. of Wausau*, 420 F.3d 378 (5th Cir. 2005) (interpreting insurance contract under Louisiana law); *Cochran v.*

(Continued on following page)

conflicting appellate precedent in the state courts. It found ample guidance in well-established principles of insurance policy construction as set forth in the Louisiana Civil Code. *In re Katrina,* 495 F.3d at 206-08, 206 n.11, App. 29-35, 35 n.11.

Petitioners do not argue that the Fifth Circuit applied an incorrect standard in deciding whether to certify the issue, except to the extent that the Petition appears to suggest that a federal court is obliged to certify any uncertain question of state law. If that is what they contend, this Court has already rejected their contention in *Lehman Bros.*, 416 U.S. at 390-91; *see also* Section II, *supra* at 9.

Petitioners cite *Arizonans for Official English v. Arizona,* 520 U.S. 43, 76 (1997), as supporting the desirability of certification. Pet. 10-11. But the factor

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B.J. Services Co. USA, 302 F.3d 499 (5th Cir. 2002) (deciding insurance coverage issue under Louisiana law); *Seafirst Commercial Corp. v. U.S. Fid. & Guar. Co.*, 780 F.2d 1290 (5th Cir. 1986) (same). *See also Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995) (declining to certify because, although the state had not addressed the exact question, general principles regarding interpretation of insurance contracts gave sufficient guidance); *Woodbridge Place Apartments v. Wash. Square Capital, Inc.*, 965 F.2d 1429, 1434 (7th Cir. 1992) (although case presented "challenging questions of contractual interpretation," certification was not appropriate because general principles provided enough guidance); *West American Ins. Co. v. Bank of Isle of Wight*, 673 F. Supp. 760, 764-65 (E.D. Va. 1987) ("Discretionary certification is inappropriate where, as here, there is persuasive authority available from other jurisdictions on the unresolved, dispositive state issue.").

most strongly supporting certification there was that allowing the Arizona Supreme Court to construe the challenged state constitutional provision might well avoid the need to decide the federal constitutional questions presented. But this case presents no federal constitutional question to be avoided.

Petitioners also cite the *dissent* in *Town of Castle Rock v. Gonzales,* 545 U.S. 748, 777 (2005) (Stevens, J., dissenting). Pet. 11. But there, as in *Arizonans for Official English,* the proposed reason for certification was to determine whether it was necessary to decide a constitutional question. Moreover, the case actually reinforces the rule that certification is discretionary, because this Court chose to predict uncertain state law, rather than certifying the question to the state supreme court.

Petitioners complain of inconsistency in failure to certify the issue here, citing other cases in which the Fifth Circuit certified insurance coverage questions to state supreme courts. The short answer to this complaint is that the Fifth Circuit evidently found the state law guidance available in those cases less clear than it did here, and chose to exercise its discretion in a different manner. *One Beacon Ins. Co. v. Don's Bldg. Supply, Inc.*, 496 F.3d 361, 364 (5th Cir. 2007) (split of authority in Texas intermediate appellate courts); *Fiess v. State Farm Lloyds,* 392 F.3d 802 (5th Cir. 2004) (split of authority in Texas intermediate appellate courts); *Jesco Constr. Corp. v. NationsBank Corp.*, 278 F.3d 444, 448 (5th Cir. 2001) (split of authority in Louisiana intermediate appellate courts); *Frey v.*

Amoco Prod. Co., 951 F.2d 67 (5th Cir. 1992) (Fifth Circuit decided the question and then, on rehearing, certified). Even if the Fifth Circuit erred in doing so, it is not typically this Court's function to correct errors in individual cases, especially not where the ultimate issue is one of state law.

III. THE DECISION OF THE LOUISIANA COURT OF APPEAL IN *SHER V. LAFAYETTE INSURANCE CO.* DOES NOT WARRANT A GVR ORDER.

A great deal of the Petition is devoted to arguing that the Fifth Circuit's decision is contrary to the later decision of a Louisiana intermediate appellate court in *Sher v. Lafayette Insurance. Co.*, No. 2007-CA-0757, 2007 WL 4247708, at *1, (La. Ct. App. Nov. 19, 2007) (plurality opinion), App. 202-269, Pet. 7, 15-19.

But there was no majority opinion in that case. Of the five judges on the panel, two found the word "flood" ambiguous[5] and two found it unambiguous. One of the two judges who found the word "flood" unambiguous, however, concluded that the property damage at issue was caused by wind, not flood, and

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[5] Judges Love and McKay concluded that the insurance policy "is ambiguous as it relates to the water exclusion because it is unclear what types of floods are excluded." *Id.* at *5, App. 214.

was therefore covered.[6] The fifth judge voted to require the insurer to pay for the property damage that it contended was caused by flood, but she did not explain her vote, so it is impossible to know whether she found an ambiguity or found a different way to support the result.

Without a majority on whether the word "flood" is ambiguous, the *Sher* decision is of little precedential value in a Louisiana state court.[7] *See Chaney v. Travelers Ins. Co.*, 249 So. 2d 181, 184 (La. 1971) (concluding that a decision had no majority opinion "on the reasons for judgment, only on the results reached[ ]" because, of seven justices, one justice concurred in the result reached only, and three judges

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[6] Judge Tobias disagreed "with the majority's analysis of the law and the facts"; he did "not read the word 'flood' in the contract of insurance as ambiguous at all. Rather, it is clear that the word 'flood' applied to any and all floods." *Id.* at *20, App. 252. But he found it possible to take judicial notice of facts which, in his opinion, established that the disputed damage was caused by wind and rain, before the arrival of the flood waters. *Id.* at *21, App. 253-54.

Judge Cannizzaro likewise found "no merit in the majority's [*sic*] conclusion that the term 'flood' as utilized in the policy at hand is susceptible to different meanings, thereby rendering the water damage exclusion inapplicable." *Id.* at *23, App. 261. It was his "steadfast conclusion that the origin of the flood, whether man-made or otherwise is of no consequence due to the clarity and unambiguousness of the water damage exclusion." *Id.* at *24, App. 263.

[7] The *Sher* decision, even if it were binding precedent, does not address all of the various formulations of the flood or water exclusions at issue in *Katrina Canal Breaches*.

dissented). *See also Citizens Comm. for Better Law Enforcement v. City of Lafayette*, 685 So. 2d 289, 293 (La. Ct. App. 1996) (stating that the holding of an earlier plurality opinion relied upon by both parties "is of little value as precedent and should properly be limited to the facts of that case only." (internal citation omitted)).

Even if *Sher* were unanimous and directly contrary to the Fifth Circuit opinion, it would not be binding on the Fifth Circuit, which would be obliged to make its own prediction of what the Louisiana Supreme Court would rule. *See, e.g., Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967). This is especially true where the issue is one of Louisiana law, because Louisiana courts do not follow *stare decisis*. Appellate decisions are not binding until there is a line of authority sufficient to constitute *jurisprudence constante*. *See Chevron USA, Inc. v. Vermilion Parish Sch. Bd.*, 377 F.3d 459, 462 (5th Cir. 2004) ("[A]lthough we may be guided by decisions rendered by the Louisiana appellate courts, we are not strictly bound by them, particularly when the jurisprudence has not developed to the status of *jurisprudence constante* (a series of decisions in accord on a given issue)."); *Lake Charles Diesel, Inc. v. GMC*, 328 F.3d 192, 197 (5th Cir. 2003) (noting that, in Louisiana, "judicial decisions acquire the force of law only when their numerosity and uniformity are sufficient to achieve the status of *jurisprudence constante*.").

Moreover, the two-judge plurality opinion finding the *Sher* flood exclusion ambiguous is not persuasive. It does not address, or even acknowledge, the extensive, careful, and detailed analysis by the Fifth Circuit. The opinion simply asserts, without any support, that "'flood' is susceptible to different meanings due to the varying causes of floods," requiring selection of a meaning that conforms to the object of the contract. *Sher*, 2007 WL 4247708, at *4, App. 212-213. On this basis, the plurality opinion reasons as follows:

> A review of the Policy reveals that the parties intended to cover and include all risks that were not specifically excluded or limited. Lafayette failed to specifically exclude all floods because of the ambiguity contained within the water exclusion. While the Policy states that it does not cover damage caused by a "flood," it also states that it does not cover "waves, tides, tidal waves," and the "overflow of any body of water . . . whether driven by wind or not." This exclusion includes "flood," but then continues to list specific natural disasters that cause inundations of water, commonly labeled as "floods." For example, a varying cause of flood can be man-made or natural, as documented in La. R.S. 29:762, which states that a flood is a natural disaster.[4]
>
> [4] La. R.S. 29:762 Definitions reads in pertinent part:

> (12)(a)(iii) A disaster, including but not limited to natural disasters such as hurricane, tornado, storm, flood, . . .

Id. at 4-5, 5 n.4, App. 213, 213 n.4.

This is the plurality's entire analysis of the supposed ambiguity. That opinion contains no analysis of common usage or dictionary definitions, no consideration of the natural character of the flood (even though the levees had failed to contain the flood), and no examination of caselaw. The opinion simply asserts, without support, that the other specifically excluded events involve only natural causes (an assertion the Fifth Circuit had shown to be false). (*See* discussion, *supra*, at 3-6.) So, even if this opinion were unanimous, it would provide no compelling reason for the Fifth Circuit to alter its prediction as to the likely decision of the Louisiana Supreme Court.

Thus, *Sher* cannot constitute an "intervening development[] . . . that [this Court might have] reason to believe the [Fifth Circuit] did not fully consider, [and which would] reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Charter*, 516 U.S. 163, 167 (1996) (*per curiam*). Because that standard is not met, there is no occasion for this Court even to consider granting certiorari, vacating, and remanding for further consideration in light of *Sher*, even if such a GVR could possibly be

appropriate with respect to a decision of a lower state court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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